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The Wakf of moveables

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27. The Waqf of Moveables.

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PREFACE.

The subject of this paper has been a fruitful source of controversy among jurists in all ages in all countries under Muslim Law. Elsewhere [1] I have traced in detail the history of this controversy in the various countries of Islām. Here I shall content myself with merely indicating the conflicting decisions on the point to be found in the Indian Law Reports: *Khajah Hossein Ali* v. *Shahzadi Hazrah Begum* (1869), 12 W.R., 344; *Fatima Bibi* v. *Ariff Ismailji Bham* (1881), 9 C.L.R., 66; *Kaleloola* v. *Naseerudeen* (1894), 18 Mad. 201; *Abu Sayid Khan* v. *Bakar Ali* (1901), I.L.R., 24 All. 190; *Sakina Khanum* v. *Laddan Sahiba* (1902), 2 C.L.J., 218; *Civil Rule* No. 51 of 1902, unreported (Rangoon, 1903); *Mofazzul Karim* v. *Mohammed* (1905), 2 C.L.J., 166; *Kulsom Bibi* v. *Golam Hossein Cassim Ariff* (1905), 10 C.W.N., 449; *Banubi* v. *Narsingrao* (1906), I.L.R., 31 Bom. 250; *Mohammed Ismail Ariff* v. *Ibrahim Gholam Ariff*, unreported (Rangoon, 1907); *Bai Fatmabai* v. *Golam Hossein* (1907), 9 Bom. L.R., 1337; *Yusuf Saratera* v. *Mollah Mahmood*, unreported (334 of 1907) decision of the Cal. H. C.; *Kadir Ibrahim Rowther* v. *Mahomed Rahamadulla Rowther* (1909), 33 Mad., 118.

For the purpose of this paper I do not claim to have laid under contribution all the works extant on Muslim Law. Besides those works from which I have made the excerpts, there are others which support my view, e.g. the *Fatāwá Anqarawiyyah*, p. 704, ed. Cairo, *Minhāj al-Ṭālibīn*, *Fatḥ al-Qarīb*, etc.

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[1] *History of Muslim Law* (Tagore Law Lectures 1911).

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A careful perusal of this paper—the result of considerable labour and research—containing excerpts from works of the highest authority, will, I venture to hope, leave no doubt in the minds of the readers about the validity of the *waqf* of moveables, including money, shares in companies, securities, stock, etc. In order to follow the historical development of this branch of Muslim Law, the reader would do well to peruse the extracts in the order indicated in the Bibliography in Appendix I. The relevancy of some of the extracts (apparently irrelevant to the matter in issue) will, no doubt, be obvious to the practical lawyer, if not to the lay reader.

I have kept the English translation as close to the original as possible, even at some sacrifice of the English. Passages in the translation placed within crotchets do not occur in the Arabic original, and are inserted merely for explanatory reasons. Similarly, passages in the original enclosed within crotchets have been omitted in the translation, to avoid repetition or the introduction of irrelevant matter. The system of transliteration adopted by me is, with slight modifications, that recommended by the Fourth Congress of Orientalists.

I take this opportunity of expressing my sincere thanks to Muḥammad 'Alī Chevky Bey, and to Zaimzadé Ḥasan Fehmy Bey, grandson and First Secretary respectively to Field-Marshal Ghāzī Aḥmad Mukhtār Pasha, late Ottoman High Commissioner in Egypt, for obtaining access for me to several important Libraries in the Ottoman Empire, and also for procuring for me the Fatwás of the Grand Mufti of Egypt, and of the Mufti of Alexandria; to Shams al-Ulama Shaykh Maḥmūd Gīlānī for the Fatwá from his brother, the celebrated Mujtahid of Karbalā; to Lt.-Col. Phillott for affording me every facility for research and placing at my disposal the Library of the Board of Examiners which is rich in the possession of some unique manuscripts on Muslim Law; and lastly, to my friend and colleague Mr. R. F. Azoo, for assistance in the elucidation of several obscure and difficult passages in the original.

In a subsequent issue of the *Journal* of this Society I hope to give a translation of the well-known treatise on the subject of this paper by the celebrated Shaykh al-Islām, Mufti Abu'l-Su'ūd, a manuscript copy of which I have just discovered in Constantinople. I am indebted to the Hon. Mr. G. H. C.

Ariff for having arranged to procure for me a transcript of that unique manuscript.

THE BAR LIBRARY: *August*, 1911. } A. AL-MA'MŪN SUHRAWARDY.

RULES FOR THE GUIDANCE OF THE JUDGE.

I. The following extract from the commentary of the *Hidāyah* by Ibn Shaḥnah is quoted by the great doctor al-Bīrī at the beginning of his commentary on *al-Ashbāh* :—

When the accuracy of a *ḥadīth* (saying of the Prophet) is accepted and it is found to be contrary to the doctrine of the *madh-hab* (school), practice should be in accordance with the *ḥadīth*, and thenceforward it shall be considered as his (Abū Ḥanīfah's) *madh-hab* and his sectary will not be excluded from being considered a Ḥanafī on account of his acting in accordance with the *ḥadīth*. For verily the following is a genuine dictum of Abū Ḥanīfah :—" When a *ḥadīth* is proved to be accurate it is my *madh-hab*." Ibn 'Abd-al-Barr reports this dictum from Abū Ḥanīfah and other Imāms. Imām al-Sha'rānī also reports this from the four Imāms.

. . . . . " The signs of mercy " : the difference of opinion of the Imāms affords latitude and facility to the people ; as is laid down at the beginning of the *Tātārkhāniyyah*. This is an allusion to the celebrated *ḥadīth* on the lips of men, *viz.*, " The difference of opinion of my people is a mercy from God " : . . . . . Said the Prophet of God : " Whatever you have been given in the Book of God, you must act upon. There is no excuse for anyone for abandoning it. If it is not in the Book of God, then my previous practice. But if there is no practice of mine, then what my companions have said. For verily my companions are like the stars of the heavens ; whichever of them you follow, you will be guided aright ; and the divergence of opinion of my companions is a blessing to you " . . . . Al-Suyūṭī reports from 'Umar b. 'Abd-al-'Azīz that he used to say : " It would not have pleased me if the companions of Muḥammad had not differed. For had they not differed there would have been no concession, facility or indulgence (*rukhṣah*). (*Radd-al-Muḥtār*, vol. i, p. 70. Ed. Const.).

II. It is known that divergence of opinion is one of the signs of mercy. Thus, the greater the difference the greater the blessing, as they (the Ulema) have declared. (*Durr al-Mukhtār*, vol. i, p. 70. Ed. Const.).

The rule guiding the *Muftī* in delivering his *fatwás* is that he should deliver *fatwás* positively regarding matters about which

our jurists are unanimous in the "Conspicuous Reports"; but opinions differ regarding matters about which they differ. The most correct view is that stated in the *Sirājiyyah* and other works, *viz.*, that the *Muftī* should give *fatwá* according to the dictum of the Imām absolutely, then according to the dictum of the second, then that of the third, then according to that of Zufar and Ḥasan b. Ziyād. In the *Ḥāwī-al-Qudsī*, the strength of the argument is regarded as the correct criterion. When there is conflict between two views declared to be correct.—It is laid down in the chapter on *Waqf* of the *Baḥr al-Rā'iq* and other books that when there are two "correct views" regarding any particular question, it is lawful to give judgment and *fatwá* according to either of them.

In the beginning of the *Muḍmarāt* it is stated: The signs of the *fatwá* are his (the jurist's) saying, 'in accordance therewith is the *fatwá*'; 'with it is given the *fatwá*'; 'it we follow'; 'on it is the reliance'; 'in accordance with it is the practice to-day'; 'in accordance with it is the practice of the people'; 'this is the correct view,' or 'the most correct,' or 'the most obvious,' or 'the most likely,' or 'the most reasonable,' or the select,' and such like expressions stated in the super-commentary of al-Bazdawī. End of the quotation. Our master al-Ramlī says in his collection of *fatwás*: Some expressions are more emphatic than others. Thus the word *fatwá* is more emphatic than the word "correct," "most correct," "most likely," etc. The expression "with it is given the *fatwá*" is more emphatic than "the *fatwá* is in accordance therewith." "Most correct" is more emphatic than "correct"; and "more cautious," than "precaution." End of the quotation. But in the commentary of the *Munyah* by al-Ḥalabī . . . . . it is stated that when there is confliction between two Imāms of authority, one employing the word "correct," the other "the most correct," it is better to follow the view signalised "correct." For both of them are unanimous as to its being "correct," and it is more agreeable to follow the view about which there is unanimity. . . . I found afterwards in the treatise on the "Duties of a *Muftī*" that when a report in an authentic work ends with "the most correct," "better" or "*a fortiori*," or "the most conformable," or the like, then the *Muftī* is at liberty to give *fatwá* according to it or its opposite view, whichever he likes. When a report concludes with "correct," or "the view followed," or "with it is given the *fatwá*," or "in accordance therewith is the *fatwá*," *fatwá* is not given according to its opposite view, unless it is stated in the *Hidāyah*, for instance, "it is correct," and in the *Kāfī* its opposite view has "it is correct." In such a case he has the option and he selects what he considers to be the strongest, best and most advantageous. End of the quotation. This should be remembered. The substance of what Shaykh Qāsim

says in his "Correction" is that there is no difference between a *Muftī* and a *Qāḍī* except that the Muftī gives information as to the rule and the *Qāḍī* gives effect to it. (*Durr al-Mukhtār*, vol. i, pp. 70 to 76).

Comments of the *Radd.*

III. "Conspicuous Reports . ." The questions dealt with by our Ḥanafī masters are classed into three groups, to which I have already alluded:

1. *Questions of fundamental principles, also called Conspicuous Reports.*—These are the questions reported from the leaders, founders of the school, Abū Ḥanīfah, Abū Yūsuf, Muḥammad, Zufar, Ḥasan b. Ziyād and others, who studied under Abū Ḥanīfah. But the common view is that "Conspicuous Reports" comprise the dicta of the three. The Books of Conspicuous Reports are the six books of Muḥammad, *viz.*: (1) *Mabsūṭ*, (2) *Ziyādāt*, (3) *Jāmi'-al-ṣaghīr*, (4) *Siyar-al-ṣaghīr*, (5) *'Jāmi'-al-Kabīr*, and (6) *Siyar-al-Kabīr*. They are designated "Conspicuous Reports," because they report from Muḥammad authentic reports which are proved to come down from him either on account of their coming from different repeated sources or on account of common repute.

2. *Questions of Rarity.*—These are questions reported from the above-mentioned masters, but not in the above-mentioned books. Rather they are contained either (*a*) in other works of Muḥammad, *e.g.*, *Kaysāniyyāt*, *Hārūniyyāt*, *Jurjāniyyāt*, *Raqqiyyāt* . . . . . or (*b*) in books by authors other than Muḥammad, *e.g.*, *Muḥarrar* by Ḥasan b. Ziyād, etc., or books containing notes dictated by Abū Yūsuf to his pupils or (*c*) reported by a single isolated report, *e.g.*, the report of Ibn Simā'ah, etc., regarding certain specified questions.

3. *Occurrences.*—These are the questions deduced by later *Mujtahids* when questioned about cases with regard to which they could not find any report. They (later *Mujtahids*) are the companions of Abū Yūsuf and Muḥammad and the companions of their companions, and so on, and they are numerous. Thus amongst the companions of the two Imāms are men like 'Iṣām b. Yūsuf, Ibn Rustam, ... Abū Ḥafs al-Bukhārī . . . . Sometimes they have controverted the views of the founders of the school because of the proofs and causes which came to their knowledge. The first collection of their *fatwás* according to our information was that by the jurist Abu-'l-Layth of Samarqand. After him other collections were made by other masters, *e.g.*, *Majmū'-al-Nawāzil*, *Wāqi'āt al-Nāṭifī*. . . . Know that amongst the books of the questions of fundamental principles is the *Kitāb al-Kāfī*, by al-Ḥākim al-Shahīd, which is an authentic work on the traditional rules of the school, and has been commented on by a number of doctors amongst whom Imām Shams

al-A'immah al-Sarakhsī may be mentioned. It is known as the *Mabsūṭ* of al-Sarakhsī. According to the most learned doctor al-Ṭarsūsī, whatever is opposed to the *Mabsūṭ* of al-Sarakhsī should not be acted upon; no *fatwá* should be given except in accordance with it, and no reliance should be placed except upon it. The *Muntaqá*, also by him, is also one of the books of the school . . . Know that there are numerous copies of the *Mabsūṭ* reported from Muḥammad, the clearest of which is the *Mabsūṭ* of Abū Sulaymān al-Jawzjānī. A number of later jurists have commented upon the *Mabsūṭ*, *e.g.*, the Shaykh-al-Islām Bakr, better known as Khwāherzādéh, his commentary being called the *Mabsūṭ-al-Kabīr*; and Shams-al-A'immah al-Ḥalwā'ī and others. Their *Mabsūṭs* are really commentaries interwoven with the *Mabsūṭ* of Muḥammad, as the commentators of the *Jāmi'-al-Ṣaghīr* have done, *e.g.*, Fakhr-al-Islām, Qāḍī Khān and others. Thus it is said, "Qāḍī Khān has mentioned it in the *Jāmi'-al-Ṣaghīr*," his commentary being intended thereby. Similarly in other works. . . . This should be carefully remembered, for it is as important to remember this as the classification of the Masters of the School which we shall mention shortly. In the chapter of the two 'Īds of the *Baḥr* and *Nahr* it is stated that the *Jāmi'-al-Ṣaghīr* was written by Muḥammad after the *Aṣl*, therefore what it contains is reliable. The *Nahr* also states that the *Aṣl* was designated *Aṣl*, because it was composed first of all, then the *Jāmi'-al-Ṣaghīr*, then the *Kabīr*, then the *Ziyādāt*. Thus it is laid down in the *Ghāyat-al-Bayān*.

"*Dictum of the Imām*": The *Muftī* gives *fatwá* in accordance with the dictum of the Imām, because, says 'Abd-Allāh b. Mubārak, he had seen the Companions of the Prophet and had given *fatwás* contemporaneously with the successors of the companions, therefore his dictum is more correct and stronger so long as there is no change of time and age.

"In the *Hāwī al-Qudsī*, etc.": I say that this is indicated by the statement of the *Sirājiyyah* to the effect that the first view is more correct when the *Muftī* is not a *Mujtahid*. Thus it is explicit that the *Mujtahid* (*i.e.*, one fit to examine the argument, proof) should follow, out of the various dicta, that which has the strongest proof. Otherwise the order stated above will be followed. Owing to this you will find that sometimes the jurists give preference to the dictum of some of his companions over the dictum of Abū Ḥanīfah himself, *e.g.*, they have preferred the dictum of Zufar alone in seventeen cases. So we follow what they preferred, for they were fit to scrutinize the proof. He (the author of *Tanwīr-al-Abṣār*) has not stated any rule as to cases regarding which there are conflicting reports from the Imām Abū Ḥanīfah or there are no reports at all either from him or his companions. In the first case, *i.e.*, where there are conflicting reports, that which has the strongest argument is followed, as is laid down in the *Hāwī*. Then he says,

when there is no clear answer from any of them regarding a particular case, but the later jurists have unanimously expressed an opinion about it, it is to be followed. If, however, they differ, the opinion of the majority is to be followed.

If no answer by way of express ruling is found from any source whatever, the *Muftī* should examine the case with care, consideration and *ijtihād*, so that he may deduce a rule concerning it which should approach exemption from responsibility. "The Ulema have delivered *fatwás*, etc."

The learned base their *fatwá* (or decision) on the opinion of Abū Ḥanīfah in all questions of *'Ibādāt* (or devotional acts) .... They declare that decisions are to be based on the opinion of Muḥammad in all questions relating to distant kindred (*i.e.*, of inheritance). In *al-Ashbāh* in the chapter on the "Duties of a judge" it is stated that decision is according to the opinion of Abū Yūsuf in whatever relates to the duties of the judge, *i.e.*, because he had a fuller knowledge of the subject and because of his practical experience. For a like reason Abū Ḥanīfah after going on pilgrimage and knowing its hardships gave up his former opinion that charity is more meritorious than voluntary pilgrimage. It is stated in the commentary of al-Bīrī, that decision is according to the opinion of Abū Yūsuf in questions of evidence also, and decision is according to the opinion of Zufar in seventeen questions. . . .

When there are *Qiyās* (analogy) and *Istiḥsān* (favourable construction) regarding a particular case, the practice should be in accordance with *Istiḥsān* except in a few well-known cases. . . . When there are three views concerning a case, then the preferred opinion is that in the beginning or the end and not that in the middle. It is laid down in the *Sharḥ-al-Munyah* that when reason is in conformity with report, it should not be departed from. This is stated in the chapter on the obligatory ceremonials of prayers, where the author gives preference to the report concerning the obligatoriness of rising from the posture of bending and prostrating the body in prayer, on account of the arguments adduced, although it is contrary to the well-known report from Abū Ḥanīfah.

"In the chapter on *Waqf* of the *Baḥr*, etc." : When of two conflicting opinions, one is more favourable to the *waqf* as will be stated in the chapters on *Waqf* and *Ijārah*, the *Muftī* should deliver *fatwá* in accordance with that opinion, out of the conflicting views of the Ulema, which is more favourable to the *waqf*; and likewise if one of the two conflicting views is the view of the majority, as we have quoted above from *al-Hāwī*.

"And such like expressions" : *e.g.*, their saying, "Its practice has become current"; "It is the recognized practice."

"Our Master" : wherever this expression occurs in this book without any further qualification, the most learned doctor Shaykh Khayr-al-dīn al-Ramlī is meant by it.

"More suitable": *i.e.*, to the requirements of his time. "More advantageous": is that which he deems suitable to that particular case. (*Radd-al-Muḥtār*, vol. i, pp. 71—76. Ed. Constantinople).

IV. It is stated in *al-Mi'rāj* on the authority of Fakhr al-A'immah :—"If a *Muftī* were to decide in accordance with any of these (*i.e.*, weak) opinions in cases of necessity with a view to convenience or to make matters easy, it will be right. (*Ibid.*, vol. i, p. 79).

V. *The seven ranks of Mujtahids or eminent jurists.*—The *Muftī* should know the position of the jurist on whose opinion he bases the *fatwá*. It is not enough merely to know his name and genealogy, but it is essential to be aware of the extent of his knowledge of reports, his eminence in reasoning and his rank in the classification of the jurists, so that he may intelligently discriminate between jurists holding opposite views and have adequate power to give preference to one of two conflicting views. (1) To the first class belong the *Mujtahids* with respect to the Sacred Law, *e.g.*, the four Imāms, and those who followed their policy in founding the first principles of jurisprudence, and by this characteristic they are distinguished from others. (2) To the second class belong the *Mujtahids* within the School, *e.g.*, Abū Yūsuf and Muḥammad and the rest of the companions of Abū Ḥanīfah, capable of deducing rules from the proofs in conformity with the first principles concerning rules laid down by their master Abū Ḥanīfah. Although they have differed from him in certain minor rules, they follow him with respect to the fundamental principles. In this respect they are distinguished from the opponents of the School like al-Shāfi'ī and others, opposed to him (Abū Ḥanīfah) as regards rules, and not following him as regards fundamental principles. (3) To the third class belong the *Mujtahids* of cases regarding which there are no express rulings from the founder of the School, *e.g.*, al-Khaṣṣāf, Abū Ja'far al-Ṭahāwī, Abu'l-Ḥasan al-Karkhī, Shams al-Ayimmah al-Ḥalwā'ī, Shams al-A'immah al-Sarakhsī, Fakhr al-Islām al-Bazdawī and Fakhr al-dīn Qāḍī Khān and others like them. They can oppose Abū Ḥanīfah neither with regard to fundamental principles nor with regard to rules applicable to particular cases, but they deduce rules, applicable to cases regarding which there are no express rulings, in conformity with the fundamental principles and rules. (4) The fourth class is that of the "people of *takhrīj*" (deduction), comprising of such sectaries as al-Rāzī and men like him. They are not at all capable of making *Ijtihād*, but on account of their thorough grasp of the fundamental principles and mastery over the original sources, they are capable of making detailed analysis of a general dictum susceptible of double meaning, and an ambiguous rule capable of two interpretations, reported from the founder of the School or one of his companions, by means of their own

judgment and examination of the fundamental principles, and analogy based on a comparison of similar and parallel cases. The statement in the *Hidāyah*, "Such is the *takhrīj* of al-Karkhī and the *takhrīj* of al-Rāzī" is of this kind. (5) The fifth class is that of "the people of preference" from amongst the sectaries, *e.g.*, Abu'l-Ḥasan al-Qudūrī and the author of the *Hidāyah* and others like them Their position is that of giving some reports preference over others, like their saying, "This is better"; "This is more correct as to report"; "This is more lenient to people." (6) The sixth class comprises the sectaries capable of discriminating between "the strongest," "strong" and "weak," between the obvious reports of the School and the rare reports, *e.g.*, the authors of authentic texts from amongst the later jurists, *e.g.*, the author of the *Kanz*, the author of the *Mukhtār*, the author of the *Wiqāyah* and the author of the *Majmū'*. Their position is that they do not report rejected traditions and weak reports. (7) The seventh class comprises of those below the rank of the jurists mentioned above.[1] (*Radd.* i, p. 79).

VI. Absolute *Mujtahids* [*i.e.*, of the first rank like Abū Ḥanīfah, Mālik, etc.] have become extinct. But limited *Mujtahids* are divided into seven well-known ranks. As for us, it is our duty to follow what they have preferred and declared correct as we would have followed their *fatwá* in their lifetime. If it is said that sometimes they state opinions without indicating any preference, and sometimes they differ as to the correct view, I reply that we should act as they acted, *viz.*, take into consideration the varying practice, the condition of society, that which is more lenient, that with regard to which practice (*Ta'āmul*) becomes manifest, and that whose reasoning is strong. (*Durr-al-Mukhtār*, vol. i, p. 80. Ed. Const.).

Comments of the Radd-al-Muḥtār.

VII. "*Without indicating any preference*": So it shall not be departed from without there being an explicit preference in favour of the opposite view. The same rule holds good when one of the two views occurs in the texts or commenta-

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[1] Mawlawī 'Abd-al-Ḥayy of Lucknow, in his Introduction to his commentary on the *Sharḥ-al Wiqāyah* (p. 8), reproduces this classification of eminent jurists with some further details. He adds a note on "the people of preference" to the following effect: Amongst them al-Kafawī counts 'Alī al-Rāzī, pupil of Ḥasan b. Ziyād, Ibn Kamāl Pasha of Turkey, and Abū'l-Su'ūd al-'Imādī of Turkey, the celebrated commentator of the Qur'ān; the author of *Baḥr al-Rā'iq* counts also amongst them Ibn Humām, the author of *Fatḥ-al-Qadīr*. It is also said that the latter attained the rank of a *Mujtahid*.

ries, or happens to be the view of the Imām (Abū Ḥanīfah) or there is *Istiḥsān* regarding cases other than those excepted, or it happens to be more favourable to the *waqf*. (*Vol. I, p.* 80).

VIII. "*His School*": A Ḥanafī giving judgment according to the school of Abū Yūsuf or Muḥammad gives judgment according to his own school.

"*Contrary to his school*": *i.e.*, the fundamental basis of his school, *e.g.*, when a Ḥanafī gives judgment according to the school of al-Shāfi'ī, etc. . . . . But if a Ḥanafī gives judgment according to the school of Abū Yūsuf or Muḥammad or any other companion of the Imām like them, the judgment will not be contrary to his opinion (*Durar*), *i.e.*, because the companions of the Imām never gave expression to an opinion which was not originally held by the Imām himself. (*Radd al-Muḥtār*, iv, 518. Ed. Const.).

IX. The 'Umdat-al-Ri'āyah, Commentary on the Sharh-al-Wiqāyah, Introduction by 'Abd-al-Hayy. (*Ed. Lucknow*).

The fact of the matter is that our greatest Imām said, "It is not permitted to any one to accept our dictum so long as he is not aware of its source, either from the Book, the Sunnah, the consensus of the people, or manifest analogy with regard to any particular case." (*'Umdat-al-Ri'āyah*, p. 14, Ed. Lucknow).

Al-Shāfi'ī said, "When a *ḥadīth* is found to be correct contrary to my dictum, throw my dictum over the wall, and act on the sound *ḥadīth*." (*Ibid.*, p. 14).

In the chapter of the *Ashbāh* on the Duties of a Judge, it is laid down that the *Muftī* should base his *fatwá* on what he considers to be advantageous. The same view is stated in the chapter on Dower of *al-Bazzāziyyah*. . . . . It is laid down also in the *Ashbāh* that the *fatwá* regarding a *waqf* should be based on what is most favourable to it. The same view is stated in the *Sharḥ-al-Majma'* and the *Ḥāwī-al-Qudsī*. (*Ibid.*, p. 15).

By the words "Imām" and "the greatest Imām" occurring in the works of our leading jurists, the founder of the School Abū Ḥanīfah is meant. And he is also meant by the expression "founder of the School." By the phrase, "Two companions," Abū Yūsuf and Muḥammad are meant, and by "Two Shaykhs," Abū Ḥanīfah and Abū Yūsuf; by "Two sides," Muḥammad and Abū Ḥanīfah. By the "Second Imām," Abū Yūsuf is meant; by the "Divine Imām," Muḥammad; by their expression, "according to our three Imāms," Abū Ḥanīfah, Muḥammad and Abū Yūsuf; and by "four Imāms," Abū Ḥanīfah, Mālik, al-Shāfi'ī and Aḥmad, the founders of the well-known Schools. By "Shams-al-A'immah" without any further qualification occurring in the works of our eminent jurists, Shams al-A'immah al-Sarakhsī is meant. (*'Umdat-al-Ri'āyah*, p. 16)

The pronoun occurring in such expressions of the jurists as "this is the decision according to him," "this is his school," when no other substantive precedes to which it can be referred, refers to Abū Ḥanīfah, even though no mention of him precedes, because he is supposed to be mentioned conventionally. "According to the two," *i.e.*, Abū Yūsuf and Muḥammad. Sometimes Abū Ḥanīfah and Abū Yūsuf and sometimes Abū Ḥanīfah and Muḥammad are meant by this phrase according to the context.

The difference between "according to him" and "from him" is that the former indicates the School and the latter the report. Thus, when they say, "Such is the case according to Abū Ḥanīfah," it indicates that such is his School. But when they say, "From him is such and such," it indicates that such is the report from him. (*'Umdat-al-Ri'āyah*, p. 17).

Often they lay down a decision, introducing it by the expression, "it is said"; and the commentators and annotators write below it, "this alludes to its weakness." The fact of the matter is that such is the case when the author adopts it as a conventional term to indicate overruled decisions and their weakness. In such a case decisive judgments can be given regarding it . . . otherwise not. (*Ibid.*, p. 17).

X. Fatāwá Khayriyyah (*Vol. I, p.* 18, *2nd ed., Govt. Press, Būlāq, Cairo*).

Answer.—Yes, it is valid. Our celebrated Ulema have expressly declared the validity of exchange (*istibdāl*) even with dirhams and dinars. They declare that when it is advantageous to do so, it is lawful to act in spite of any stipulation to the contrary....our jurists are unanimous in giving fatwá according to what is more advantageous to the waqf where there is difference of opinion.

XI. The Is'āf (*Ed. Būlāq*).

And the subject-matter of *waqf* is any property having legal value on condition of its being land or moveable or anything the *waqf* of which is recognized. (*Muta'ārif*, p. 9).

If he makes *waqf* of a field and makes mention of the slaves, water-wheels and the implements of husbandry in it, they become *waqf* . . . and if some of them become too infirm to work, the Mutawallī may sell them, and purchase other slaves in their stead. Similarly he may sell the water-wheels and the implements and buy with their price that which is more beneficial for the *waqf* (p. 17). And in the *Fatāwá Nāṭifiyit* is reported from Muḥammad b. 'Abd-Allāh al-Anṣārī, one of the companions of Zufar, that it is valid to make *waqf* of dirhams and edibles, and that which is sold by measure and that which is sold by weight. It was said to him, "How are the dirhams to be employed?" He said, it should be invested in business

(Muḍārabah) and the profits should be spent in charity. Similarly what is sold by measure and what is sold by weight should be sold for dirhams and dīnārs, which should be invested in business and the profits given away in charity, (p. 18).

CHAPTER ON THE WAQF OF MOVEABLES BY THEMSELVES.

And the correct view is that reported from Muḥammad that it is valid to make *waqf* of such moveables with respect to which recognized practice (*Ta'āruf*) has ensued, *e.g.*, copies of the Qur'ān, books, pick-axe, hatchet, saw, cauldron and bier, on account of the existence of recognized practice (*Ta'āruf*) regarding the *waqf* of these things, whereby analogy (*Qiyās*) is abandoned as in the case of *Istiṣnā'* . . . . one of the conditions of the validity of *waqf* is perpetuity as we have described above, but we have abandoned it (*a*) regarding the things just mentioned owing to recognized practice (*Ta'āruf*); and (*b*) regarding arms and horses for *jihād* on account of express tradition.

If a person makes *waqf* of a cow for the service of a resting house, stipulating that its milk, curd and butter should be given to wayfarers, it is valid where such is the recognized practice, as in the case of the water of a public fountain; otherwise not . . . .

. . . . And it has already been stated above that Muḥammad b. 'Abd-Allāh al-Anṣārī, one of the companions of Zufar, held the *waqf* of dirhams and grain valid. (pp. 20—21).

Abū Yūsuf and Muḥammad are unanimous regarding the validity of *waqf* of *Mushā'*, which is not partible, *e.g.*, public baths, wells and mills. But there is divergence regarding what is partible. It is declared valid by Abū Yūsuf, and the jurists of Balkh have accepted his decision, but Muḥammad has declared it void, and if a Qāḍī decrees the validity of a *Mushā'* *waqf* the divergence is removed. (p. 21).

XII. THE FATĀWÁ QĀḌĪ KHĀN (*Vol. III, p.* 306, *Cairo edition*).

CHAPTER ON THE WAQF OF MOVEABLES.

Shams-al-A'immah al-Sarakhsī says:—As regards *waqf* of moveables independently there is a difference of opinion between Abū Yūsuf and Muḥammad. This is stated in the *Siyar-al-Kabīr*. He says the correct answer is as follows: Anything with regard to which there is a clear practice among men to appropriate, it is valid to make *waqf* thereof, *e.g.*, (1) Bier and its pall. (2) Anything needed for the washing of the dead, such as pot and vessels. (3) Copies of the Qur'ān. (4) Horses, camels, etc., arms and horses for *jihād*. (5) Jurists are not agreed as regards *waqf* of books, which, however, is declared valid by the jurist Abu'l-Layth, and the *fatwá*

is in accordance with it. Naṣīr, for instance, made *waqf* of his books. (6) A man makes *waqf* of a cow for the benefit of a resting house, so that what may be obtained in the shape of milk and butter and curd will be given to the wayfarers. Then if this happens in a place where they have recognized it, the *waqf* is valid, as it is valid to make *waqf* of the water of a public fountain. (7) A man makes *waqf* of an animal for the benefit of a resting place. . . . (8) A man makes *waqf* of a bull for the benefit of the people of a village, in order to cover their cows; this is not valid, because religious merit is not intended thereby, and there is no clear practice in its favour. (9) A man places a jar. . . . (10) A man makes *waqf* of a building without its site. Hilāl says this is not lawful. (11) And it is reported from Zufar: a man makes *waqf* of dirhams or grain or what is sold by measure or what is sold by weight. He declared it valid. It was said to him, "How would it (*waqf*) be (carried out)?" He said that the money should be invested in business and the profits given in charity for the benefit of the object of the *waqf*, and what goes by measure and weight should be sold and their sale proceeds invested in commerce (*biḍā'ah*) or business (*Muḍārabah*) as in the case of money. They have held on the analogy of the above decision, that if a person says "this *kurr* (measure) of wheat is *waqf*" on condition that the same should be lent to such of the poor who have no seed grains with them, so that they may cultivate the same for themselves, and then the quantity lent should be taken back from them after the crops have grown and the same should be lent to other poor people; and in this wise perpetually—the *waqf* shall be valid in this way, (12) A sick person makes a will in regard to thousand dirhams.... (13) From Abū Yūsuf it is reported that the *waqf* of animals, etc., ... is not valid. (14) A man makes *waqf* of a garden with cows, cattle, slaves, etc., ... valid. (15) A man in good health makes a *waqf* of a place and divests it from himself, whereupon a usurper takes possession of it, and intervenes between the *waqf* and him. The Shaykh Imām Abū Bakr Muḥammad b. al-Faḍl says: Its price should be taken from the usurper and another place should be bought with it, and he shall make *waqf* of it according to the conditions of the previous one.

. . . When the thing dedicated deteriorates, it is necessary to supply a substitute, as in the case of a dedicated horse, which is killed, or when a slave dedicated to the service of the *Ka'bah* is killed. (16) If the Mutawallī of a *waqf* spends the dirhams of the *waqf* for his own use. . . . . (17) Mutawallī may sell animals dedicated to a resting-house when they become old and useless. (18) The people of a mosque . . . . . (19) Mutawallī of a mosque buys a house with the income of the mosque. . . . . (20) Mutawallī buys a bier with the income of the mosque bv . . . . . (21) Ruined village with a well . . . .

(22) *Waqf* of a building without its site, ... (23) It is reported from Zufar that when a person makes a *waqf* of dirhams and grain, and what is capable of being measured or weighed, it is valid . . . . (24) When *waqf* is made of a bier . . . . etc.

XIII. The Jāmi'-al-Rumūz of al-Quhistānī (*Vol. III, p.* 524, *Ed. Cal.*).

And it is valid according to Muḥammad to make *waqf* of moveables (*i.e.*, things capable of being moved from one place to another) with regard to which there is *Ta'āmul* (*i.e.*, *Ta'āruf*), *e.g.*, a copy of the Qur'ān . . . . . and the like (*e.g.*, books, pickaxes, saws, vessels, bowls, biers, and their palls; arms, horses, donkeys, slaves, oxen, agricultural implements, trees, right of water with the land, pigeons with their cote, bees with their hive. But if they are not the subject of *Ta'āmul*, their *waqf* is not valid except by way of dependence. Thus it is laid down in the *Mughnī* and other books, and it is stated in *al-Zāhidī* that according to Muḥammad, *waqf* of moveables is valid even if it be not the subject of recognized practice (*Ta'āmul*). But according to Abū Yūsuf the *waqf* is void if it is not the subject of *Ta'āmul*. And the *fatwá* is in accordance with it, *i.e.*, the *fatwá* is given in accordance with the view of Muḥammad which declared such a *waqf* valid, because of the necessity of the people.

XIV. The Durr-al-Muntaqá (*Vol. I, p.* 746, *Ed. Const.*).

Similarly the *waqf* of any moveable property whose *waqf* is recognized (*Ta'āruf*) is valid according to Muḥammad; so also is valid according to Muḥammad the *waqf* of such moveables of which the *waqf* is not recognized in practice, but it is void according to Abū Yūsuf, if their *waqf* is not so recognized. Thus it is laid down in the *Sharḥ-al-Wahbāniyyah* from *al-Zāhidī* from the *Siyar-al-Kabīr*, and it has been followed by *Shurunbulālī* who has affirmed the rule, and it has been cited by al-Quhistānī, who has also affirmed it. This must be carefully noted. But in *al-Birjindī*, etc., it is stated that the *waqf* of moveables whose *waqf* is not recognized in practice is not valid, according to all the three. But according to al-Shāfi'ī everything from which profit can be derived consistently with the preservation of its original, provided that its sale is lawful, its *waqf* is valid just as that of land . . . . . As for instance pickaxes, shovels, and all implements of husbandry, right of water, hatchets, saws, biers and their palls, and likewise the *waqf* of woollen clothes for the benefit of the poor. And in our time some Mutawallīs have made *waqf* of furs for the use of the Muezzins at night in winter. Such a *waqf* ought to be valid, especially according to the statement above, reported from al-Zāhidī. "*Cauldrons, pots, copies of the*

Qur'ān, books, etc." And our jurists have added moveable articles to those mentioned by Muḥammad and Abū Yūsuf, acting on the principle of *Ta'āmul*, as is laid down in the *Manḥ*. I, therefore, say that taking into consideration this opinion and that of al-Zāhidī, already stated above, there is no need of referring to the report of al-Ansārī from Zufar with regard to *waqf* of *dirhams* and *dīnārs* as has been supposed, and indeed have been issued royal orders to the Qāḍīs, to give decrees according to it (the view validating the *waqf* of dirhams and dinārs) as is laid down in the *Ma'rūḍāt* of the Muftī Abū'l-Su'ūd. Similarly the *waqf* of articles capable of being measured or weighed is valid, they being sold and their price being applied in business or commerce like dirhams. On the analogy of this they have declared the validity of the *waqf* of a *kurr* of wheat on condition that it should be lent to one who has no seed, etc. . . . . .

If a person makes *waqf* of a cow on condition that whatever comes out of it in the shape of milk and butter should go to the poor, if they are in the habit of doing so, I should expect the *waqf* to be valid. The *Manḥ* has added to the list the *waqf* of buildings without the site, and likewise that of trees without the land, because they are moveables with regard to which there is *Ta'āmul*.

And according to it, *i.e.*, the view of Muḥammad, is the *fatwá*, in consequence of the existence of *Ta'āmul*, whereby *Qiyās* is abandoned as in the case of a contract with an artisan for supplying articles to be made to order (*Istiṣnā'*). The Prophet has said: "Whatever is good in the sight of the Muslims is good in the sight of God."

XV. The Majma'-al-Anhur (*Vol. I, p.* 746, *Ed. Const.*).

The *waqf* of land is valid . . . . . .

Similarly is valid according to Muḥammad the *waqf* of moveables, the *waqf* of which has become recognized in practice (*Ta'āruf*), as is valid the *waqf* of moveables directly when people have made a *Ta'āmul* of their *waqf*, e.g., pickaxes, shovels, hatchets, saws, biers with their palls, cauldron, pots, copies of the Qur'ān, books. And according to it, *i.e.*, the view of Muḥammad, is the *fatwá* in consequence of the presence of *Ta'āmul* in these articles. And this view has been adopted by the majority of the jurists of all countries: and that is the correct view, as is laid down in the *Is'āf*; and that is the view of the generality of jurists as is laid down in the *Ẓahīriyyah*. Because *qiyās* is sometimes abandoned on account of *Ta'āmul* as in the case of *Istiṣnā'* . . . . And *al-Mujtabá* reports the difference of opinion between Abū Yūsuf and Muḥammad differently to what has been just stated, *viz.*, that according to Muḥammad, *waqf* of moveables was valid, absolutely, whether any practice respecting it prevailed or not, the view of Abū Yūsuf being that it was valid if there was *Ta'-*

āmul respecting it. As *Ta'āmul* became prevalent with regard to the *waqf* of dīnārs and dirhams in the time of Zufar, their *waqf* being declared valid according to one report, they came within the purview of the dictum of Muḥammad in accordance with which is the *fatwá* respecting the *waqf* of every moveable concerning which *Ta'āmul* may arise as is obvious. Consequently there is no need of especially ascribing the view in favour of the validity of their *waqf* to the doctrine of Zufar as reported by al-Anṣārī; and verily has the author of the *Baḥr* given *fatwá* in favour of their validity without reporting any difference of opinion on this point; this is laid down in the *Manḥ* . . . . . .

. . . . And the present practice is to decree in favour of its validity. Similarly such is also the rule in the case of *waqf* of trees, and in the *Manḥ* it is laid down: "the recognized practice of our country is to make *waqf* of a building without its site. So also the *waqf* of trees without the land: thus the *fatwá* is determined in favour of its validity because these are moveables in which there is *Ta'āmul*." By *Ta'āmul* is intended the *Ta'āmul* of the companions of the Prophet and that of the companions of the companions, and of the *Mujtahids* from among the Imāms of the faith, and not the *Ta'āruf* of the common people, as some of the learned have held. According to this view, the statement of the author of *al-Manḥ*, *viz.*, "that the practice, etc., because they are moveables in which there is *Ta'amul*," is not reliable. But in the *Muḥīṭ* and other works it is laid down: "A man makes a *waqf* of a cow for the benefit of a resting-house, on condition that what comes out in the shape of milk and butter should be given to the wayfarers: where such *waqf* prevails, I should expect it to be valid." But some of our jurists hold it to be valid absolutely, "Because," say they, "*Ta'āruf* has ensued with regard to it in the country of the Muslims." This shows that the meaning is absolute *Ta'āruf*, not what some have said.

XVI. Mullā Miskīn and the Fatḥ-al-Mu'īn (*Vol. II, p.* 507, *Edition Cairo*).

(*a*) *Text of the Kanz with the Commentary of Mullā Miskīn.*

The *waqf* of moveables in which there is *Ta'āmul* is valid, *i.e.*, with regard to making *waqf* of which there is practice ('Ādah), unrestrictedly whether it is a copy of the Qur'ān, or pickaxe, or shovel, or hatchet, or saw, or bier or its pall, or cauldrons, or pots, or transport animals, according to Muḥammad. And the generality of jurists have adopted his view on account of *Istiḥsān*.

(*b*) *Commentary of the Fatḥ-al-Mu'īn.*

"In which there is *Ta'āmul*": *e.g.*, pickaxes, hatchets

dirhams and dīnārs. Thus it has been laid down in the *Tanwīr*, and this is the view of Muḥammad, and according to it is the *fatwá*.—*Durr* from the *Ikhtiyār*.

From this we learn that the *waqf* of dirhams and dīnārs belongs to the class of *waqf* influenced by *Ta'āmul*, and the same information we gather from the statement of al-Zayla'ī and al-'Aynī. Accordingly *Ta'āmul* in all countries is not a condition, and this shows the inaccuracy of the argument of the *Nahr* when it says, "The statement of Muḥammad, which has just preceded, necessitates the invalidity of *that* in Egyptian lands in consequence of the absence of its practice (*Ta'āruf*) altogether. Yes, indeed, the *waqf* of dirhams and dīnārs has become recognized in the Turkish dominions." Again in the *Sharḥ Multaqá'l-Abḥur* by al-'Alā'ī[1] after the quotation from the text the following comments occur: "And similarly is valid the *waqf* of moveables whose *waqf* is recognized in practice according to Muḥammad, and similarly that which is not recognized in practice is also valid according to Muḥammad, as is laid down in the *Sharḥ al-Wahbāniyyah* from *al-Zāhidī* from the *Siyar-al-Kabīr*, and *Shurunbulālī* has followed it, and al-Quhistānī has affirmed it." Then it (*Sharḥ-al-Multaqá*) states, "Therefore according to what has preceded as reported from al-Zāhidī, there is no necessity for referring to the report of al-Anṣārī from Zufar. And the royal command had already been issued to the Qāḍīs to give decision to that effect as is laid down in the *Ma'rūḍāt* of the Muftī Abu'l-Su'ūd.", From this it is learnt that the *fatwá* of some to the effect that the view declaring the validity of the *waqf* of dirhams is weak, because of its having been reported from Zufar, is incorrect. "*That is to say, there is practice to make waqf of it*": On account of the saying of the Prophet, "Whatever is good in the sight of the Muslims is good in the sight of God," and because *Ta'āruf* is stronger than *qiyās*, so *qiyās* is disregarded thereby as in the case of *istiṣnā'*.

XVII. The Baḥr-al-Rā'iq and the Manḥat-al-Khāliq (*Vol. V, p. 216 et seq., Ed. Cairo*).

The subject-matter of *waqf* is property having legal value (*Māl Mutaqawwim*), (p. 202).

The *waqf* of land with its cows and serfs is valid, and also that of *Mushā'* whose validity has been decreed, and that of moveables wherein there is *Ta'āmul*.

And Muḥammad has laid down that such moveables with regard to which there is *Ta'āmul* is valid, and the view has been adopted by the majority of the jurists of various countries . . . . . because *qiyās* is disregarded on account of *Ta'-*

[1] *i.e.*, the *Durr al-Muntaqá*.

'āmul as in the case of *Istiṣnā'*. And in the *Mujtabá* this difference of opinion with regard to moveables has been reported differently and referred to the *Sīyar*, *viz.*, that the view of Muḥammad is its validity absolutely, irrespective of there being any practice or not, and that of Abū Yūsuf is its validity provided that there is practice with regard to it. And the *Hidāyah* instances the following as examples of moveables influenced by *Ta'āmul*: pickaxe, hatchet, saw, bier and its pall, cauldrons, pots, and copies of the Qur'ān. And it is reported from Naṣīr b. Yaḥyá that he made *waqf* of his books on the analogy of the *waqf* of copies of the Qur'ān—and this is correct.

It is laid down in the *Taḥrīr* whilst discussing the primary meaning of words, that *Ta'āmul* means the more frequent in use; that is why Imām Muḥammad has confined the validity of *waqf* of moveables to those things. Therefore those things which were not influenced by *Ta'āmul* were excluded, *e.g.*, clothes, animals, gold, silver, even if in the shape of ornaments, because their *waqf* cannot be perpetual, and this is indispensable; contrary to the case of transport animals and arms because of express tradition regarding them, and to that of the articles stated above in consequence of *Ta'āmul*: the rest come under the operation of the original rule of *qiyās*. Verily some jurists have added to the list of Muḥammad other moveable articles when they perceived the prevalence of *Ta'āmul* regarding them: (1) Thus it is laid down in the *Khulāṣah*: a person makes *waqf* of a cow on condition, etc.... valid. (2) It is reported from al-Anṣārī who was a companion of Zufar, with regard to the *waqf* of dirhams or dīnārs or grain or what is measured or weighed .... valid. (3) And *waqf* of woollen clothes and covering of the dead is valid where it is made *waqf* as a perpetual charity, the woollen clothes being given to the poor to benefit by it in the season of wearing it. (4) *Waqf* of bull . . . . not valid. (5) *Waqf* of slaves and slave-girls for the service of a resting-house, valid. Thus it is laid down in the *Fatḥ-al Qadīr*. (6) The *waqf* of a boat is not stated, nor am I aware of anyone expressly stating it, and there is no doubt that it is included under such moveables as are not influenced by *Ta'āmul*. Thus its *waqf* is not valid. (7) *Waqf* of a garden with cows, cattle, slaves, etc. . . . . valid. (8) *Waqf* of medicine for hospital not valid unless the poor be mentioned. (9) Two more cases remain.—(*a*) *waqf* of a building without its site. In the *Dhakhīrah* it is laid down that the *waqf* of a building without the site is not valid because it is moveable whose *waqf* is not practised; (*b*) *waqf* of trees . . . . . not valid.

XVIII. The Hidāyah (*Vol. V, p.* 430, *Ed. Cairo*).

And Muḥammad has held that it is valid to dedicate horses and arms, *i.e.*, it is valid to make *waqf* of them in the

way of God. And Abū Yūsuf agrees with him in this on the ground of *Istiḥsān*, the *qiyās* being according to what we have said before that such a *waqf* is not valid. The reason for applying the principle of *Istiḥsān* is based on well-known traditions concerning these articles, *e.g.*, the following saying of the Prophet: "As for Khālid he has verily dedicated suits of armour and chargers in the way of God." Ṭalḥah, also, dedicated his armour in the way of God."

"Horses" means war-horses, etc. Camels are also comprehended in this term, because the Arabs ride camels in battles; arms are comprehended in the term "suits of armour."

It is reported from Muḥammad that it is valid to make *waqf* of such moveables as are influenced by *Ta'āmul*, *e.g.*, spades, shovels, pickaxes, saw, bier and its pall, cauldrons, pots, copies of the Qur'ān..... Muḥammad holds that *qiyās* is abandoned by *Ta'āmul* as in the case of *Istiṣnā'*, and *Ta'āmul* is found to exist in these articles. It is reported from Naṣīr b. Yaḥyá that he made *waqf* of his books on the analogy of the copies of the Qur'ān, and this is correct . . . . . and the majority of the jurists of various countries have adopted the view of Muḥammad. And such moveables as are not influenced by *Ta'āmul*, their *waqf* is not valid according to us. But al-Shāfi'ī has said that the *waqf* of anything from which profit can be derived consistently with the preservation of its original, provided that its sale is lawful, is valid; because it is possible to derive profit from it, and so it resembles land, horses and arms. Our (Ḥanafī) argument is that the *waqf* of these articles cannot endure perpetually, and this is indispensable as already stated. Therefore, these articles become like dirhams and dīnārs (unlike land) whilst there is no antagonistic influence either on the ground of express tradition or that of *Ta'āmul*. So they remain under the operation of the original rule of *Qiyās* (analogy). This is so because land endures, and *jihād* is the highest religious duty. Therefore the idea of piety in these two is stronger than in any other thing. So other articles besides these cannot come within their meaning.

XIX. The Fatḥ-al-Qadīr (*Vol. V, p.* 429, *Ed. Cairo*).

Al-Qudūrī says that Abū Yūsuf held the *waqf* of land with cows and its cultivators (and they are slaves) valid . . . . . And if some of them fall ill and become incapable of work, the Mutawallī may sell those who become unfit for work and buy with the price others who can work. Similarly as when some of them are killed and he takes the blood-money, he is bound to purchase another with it.

. . . . The reason for applying the rule of *Istiḥsān* is based on well-known traditions concerning those articles, *i.e.*, concerning

horses and arms. And among those traditions the following saying of the Prophet is reported from Abū Hurayrah in the two *Ṣaḥīḥs* (*al-Bukhārī* and *Muslim*) :—

"As for Khālid, verily you are hard upon him, whilst he has verily dedicated his suits of armour in the way of God."

The other statement by the author of the *Hidāyah* to the effect that Ṭalḥah dedicated his armour, is unknown. . . . . The majority of jurists of all countries follow the dictum of Muḥammad, *viz.*, that the *waqf* of those moveables which are influenced by *Ta'āmul* is valid; those which are not influenced by *Ta'āmul* it is not valid to appropriate them in accordance with our (Ḥanafī) opinion. But al-Shāfi'ī says that the *waqf* of anything is valid from which profit can be derived whilst its original endures, provided that its sale is lawful. This is the view also of Mālik and Aḥmad. But the *waqf* of anything from which no profit can be derived except by its destruction, is not valid like gold and silver, and eatables and drinkables, according to the generality of [Shāfi'ī, Mālikī and Ḥanbalī] jurists. By gold and silver is meant dirhams and dīnārs, not anything in the shape of ornaments, for as to ornaments, it is valid to make *waqf* of them according to the opinion of Aḥmad and al-Shāfi'ī, because Ḥafṣah had bought ornaments for 20,000 dirhams and dedicated them for the use of the women of the family of al-Khaṭṭāb; hence no poor-rate was levied on them. According to Ibn Qudāmah in his *Mughnī*, Aḥmad does not hold the *waqf* of ornaments valid, and denies the authenticity of this tradition. The substance of the reason of the body of Shāfi'ī, Mālikī, and Ḥanbalī jurists is based on the analogy of horses. And the author confutes this argument by saying that the effect of a legal *waqf* is perpetuity and other articles besides land do not endure, although indeed this condition is disregarded in the case of *jihād*.

Now that you have known the rules that govern the *waqf* of moveables, you should know that some jurists have added other moveables to the articles mentioned by Muḥammad when they perceived the prevalence of *Ta'āmul* [in their time]: (1) *Waqf* of cow, stipulating that milk, butter . . . . valid. (2) Reported from al-Anṣārī . . . . . *waqf* of dirhams, grain, etc. . . . . valid. (3) Woollen clothes and shrouds, when dedicated by way of charity perpetually . . . valid. (4) *Waqf* of slaves and slave-girls for the benefit of a resting-house . . . . valid.

XX. The Kifāyah (*Vol. V, p.* 431, *Ed. Cairo*).

"Consistently with the continued existence of its original" —this is in order to guard against dirhams and dīnārs, because the use for which dirhams and dīnārs are made is price [medium

of exchange] and it is not possible to profit by them consistently with the continuance of their originals in his possession. "Sale is lawful"—this is to guard against *Umm-al-Walad*, whose *waqf* is not valid. "Whilst there is no antagonistic influence on the ground of tradition"—The *qiyās* with regard to moveables is that their *waqf* is not valid, because their *waqf* does not endure, whilst perpetuity is indispensable; but the antagonistic influence of tradition has overruled *qiyās* in certain cases, as for instance, in the case of horses and arms because of the existence of well-known traditions; and in certain other cases the antagonistic influence of *Ta'āmul* has overruled *qiyās*, as for instance, in the case of axes, hatchets, shovels, cauldrons, and pots; the rest, for instance, articles like clothes and carpets, and those like slaves and slave-girls dedicated independently continue subject to the rule of *qiyās*, as there is no opposing force with respect to them on the ground of tradition or *Ta'āmul*.

XXI. The 'Ināyah (*Vol. V, p. 432, Ed. Cairo*).

We (the Ḥanafīs) contend that the *waqf* of moveables does not endure, and that is obvious, and whatever does not endure cannot be made *waqf* of—perpetuity being indispensable as stated before. Therefore all the moveables become like dirhams and dīnārs. The author's statement "unlike land" is by way of reply to his (al-Shāfi'ī's) reliance on the analogy of land. The author's statement "whilst there is no antagonistic influence on the ground of tradition" is by way of reply to his (al-Shāfi'ī's) statement, "therefore it resembles horses and arms." The reason is that like dirhams, originally, the *waqf* of horses and arms also were not valid, but that we have abandoned it (*qiyās*) in consequence of an out-weighing antagonistic influence based on tradition. The author's statement "nor on the ground of *Ta'āmul*" is by way of reply to the following argument: The original principle has been disregarded with respect to horses and arms in consequence of an antagonistic influence based on tradition which is not present in cauldrons, shovels, etc. Therefore, let the case in dispute be decided on the analogy of these. The reason is that the articles mentioned above have been affected by an antagonistic influence based on *Ta'āmul* which is not present in the question in dispute, *e.g.*, slaves and slave-girls, clothes, carpets and the like. So these remain subject to the rule of the *qiyās*.

. . . The author (of the *Hidāyah*) did not mention *Ta'āmul* relying on its being a well-known fact that *Ta'āmul* is stronger than *Qiyās*, and it is therefore permitted to disregard it (*qiyās*) in consequence of *Ta'āmul*.

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XXII. Sa'di Chalpi (*V, p.* 430, *Ed. Cairo*).

As to the statement of the author (of the *'Ināyah*) that "one of its conditions is perpetuity, and perpetuity is not present in moveables," I say that this statement is open to criticism; the reason being given in the reply from the argument of al-Shāfi'i as will be stated later on. The author says "it (the perpetuity) is indispensable as stated before." I say the logical conclusion is that what is indispensable is the continuance of the *waqf*, so long as the subject-matter of the *waqf* continues, and this condition is fulfilled in the case in dispute also. Therefore the matter requires careful consideration.

XXIII. Al-'Aynī's Commentary on the Hidāyah (*II, p.* 993, *Ed. Lucknow*).

. . . . Al-Shāfi'ī, Mālik and Aḥmad have held that *waqf* of such moveables from which profit can be derived consistently with the continuance of their originals is valid. From Mālik there are two reports with regard to the *waqf* of horses and arms. As to the *waqf* of that from which no profit could be derived except by destruction, *e.g.*, gold, silver, eatables, drinkables, it is said that their *waqf* is not valid according to the generality of [Shāfi'i, etc.] jurists and scholars, but that what has been reported from Mālik and al-Awzā'i that the *waqf* of grain is valid, has not been confirmed by the companions of Mālik: therefore, this is not correct (p. 993).

"As for Khālid, etc., in the way of God" This saying of the Prophet has been reported by al-Bukhārī and Muslim . . . . from Abū Hurayrah (p. 994).

"Al-Shāfi'ī holds that the *waqf* of everytning from which profit can be derived consistently, etc., original": This is to guard against dirhams and dīnārs because the use for which dirhams and dīnārs are made is price, etc.

"Its waqf is valid because it is possible to derive profit from it, therefore it resembles land, horses and arms": The reason is that originally the *waqf* of horses and arms was not valid, *i.e.*, every thing from which profit can be derived consistently with the continuance of its original, resembles land with respect to the validity of its *waqf*. "We (Ḥanafīs) contend that the *waqf* of them," *i.e.*, of the moveables which he (al-Shāfi'ī) mentions,

"Does not endure, and it is indispensable": *i.e.*, the state of things is that perpetuity being indispensable the *waqf* of what does not endure is not valid.

"As already described by us": *i.e.*, above, *viz.*, the condition of perpetuity.

"Therefore it becomes": (*i.e.*, every moveable from which profit can be derived consistently with the preservation of its

original), "like dirhams and dīnārs," *i.e.*, with regard to the absence of validity.

"Unlike land," *i.e.*, because there is perpetuity in it, although not expressly mentioned or stipulated.

"Whilst there is no antagonistic influence based on tradition," *i.e.*, this is by way of reply to his (al-Shāfi'ī's) statement, "therefore it resembles land, horses and arms." "Nor on the ground of *Ta'āmul*": this is by way of reply to what may be said to the effect that the principle has been abandoned in the case of horses and arms owing to an antagonistic force based on tradition which is not to be found in the case of a hatchet and shovel, etc., therefore let the question in dispute be decided on the analogy of these. The reason is that these two articles have been influenced by an antagonistic force based on *Ta'āmul* which is not to be found in the case in dispute, *e.g.*, slaves, slave-girls, clothes, carpets and the like. . . . . .

The author of the *Muḥīt* says: A person makes *waqf* of 150 dīnārs for the benefit of the sick by way of will[1]; this *waqf* is valid, and the gold should be given to a man to be employed in business (*Muḍārabah*) and the profits applied to the purposes of the *waqf*. The same rule holds good, says the *Muḥīt*, in the case of *waqf* of dirhams and what is sold by measure and what is sold by weight (p. 996).

XXIV. Mustakhlaṣ-al-Ḥaqā'iq (204, *Edn. Bom.*).

"Moveables in which there is *Ta'āmul*," *i.e.*, amongst people, *e.g.*, pickaxes, dirhams and dīnārs, cauldrons, a bier and its pall, copies of the Qur'ān and books; contrary to those in which there is no *Ta'āmul*.

XXV. The Kanz-al-Bayān (*Vol. I*, 116, *Edn. Cairo*).

It is valid to make *waqf* of a moveable independently with respect to which there is *Ta'āmul* of the people, *e.g.*, pick-axes, shovels, *dirhams, dīnārs*, cauldrons, a bier with its pall, copies of the Qur'ān and books; contrary to those with respect to which there is no *Ta'āmul*, *e.g.*, clothes and household goods in the opinion of Muḥammad and the *fatwá* is in accordance therewith.

XXVI. Al-'Aynī's Commentary on the Kanz al-Daqā'iq (*II, p.* 461, *Edition Lucknow*).

And also is lawful the *waqf* of moveables, such as horses and arms, pickaxes, cauldrons, shovels, saws, a bier and its

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[1] Or according to another reading, "for the benefit of the sick from amongst the ṣūfīs."

pall, copies of the Qur'ān, books on jurisprudence, traditions and literature, and other things besides, with regard to whose *waqf Ta'āmul* or *Ta'āruf* (practice) arises. This is the dictum of Muḥammad, and the *fatwá* is in accordance with it on account of traditions being in its favour. Arguing on the analogy of horses and arms al-Shāfi'ī holds the *waqf* of everything valid whose sale is lawful and from which profit can be derived along with the continuance of its original. We (Ḥanafīs) contend that the original state is the absence of the validity of *waqf*; therefore *waqf* should be limited to those things regarding which the law is express, *viz.*, land and horses. The rest continue in the original state suggested by analogy (*qiyās*) except those with regard to which *Ta'āmul* arises when they become like dirhams and dīnārs.

XXVII. Super-Commentary on al-'Aynī on the Kanz (*II*, *p.* 463, *Edition Lucknow*).

Wherein there is *Ta'āmul*, *i.e.*, is lawful the *waqf* of moveables with regard to which there is *Ta'āmul* of the people, *i.e.*, the practice (*'Ādah*) of making *waqf* of which has arisen. This is the view of Muḥammad, and the *fatwá* is in accordance therewith . and it is said that Abū Yūsuf agrees with him in this view.

XXVIII. The Tanwīr-al-Abṣār (*III*, *p.* 578, *Edition Const.*).

And if a person makes *waqf* of land with the cows and the serfs attached to it, it is valid like Mushā' whose validity has been decreed by a Qāḍī, and moveables wherein there is *Ta'āmul*, *e.g.*, axes, shovels, dirhams, and dīnārs.

XXIX. The Durr-al-Mukhtār (*III*, *pp.* 576-78, *Edition Const.*).

And is valid the *waqf* of slaves for the purposes of a resting house (*Khulāṣah*) . . . . . and if any is killed wilfully, recourse should not be had to retaliation (*Bazzāziyyah*), but rather the price should be realized in order to purchase with it his substitute.

"Like Mushā' etc.," because it is a case for *ijtihād*; therefore a Ḥanafī sectary has the option of decreeing the validity or nullity of the *waqf* of Mushā' because of the divergence of preference. For, when there are, with regard to a particular question, two opinions both of which are pronounced correct, it is permitted to give the *fatwá* and the judgment in accordance with either of them. (*Baḥr* and the author of the *Tanwīr-al-Abṣār*).

"And moveables, etc., *Ta'āmul*": And likewise is valid the *waqf* of every moveable independently wherein there is *Ta'āmul* of people, for instance, axes, shovels, nay, also dirhams

and dīnārs. I say nay, furthermore, the Qāḍīs have been directed by royal command to decree in favour of its validity as is laid down in the *Ma'rūḍāt* of the Muftí Abu'l-Su'ūd. And also what is sold by measure, etc., etc.

In the *Khulāṣah* it is stated that if a person makes *waqf* of a cow directing that the produce of her milk and butter should be given to the poor, if people are accustomed to that (*'Ādah*), I should expect it to be valid.

"And a cauldron and a bier": and its pall, and copies of the Qur'ān and books, because *Ta'āmul* overrules analogy in consequence of the saying of the Prophet, "Whatever is good in the sight of the Muslims is good in the sight of God." "Unlike those articles wherein there is no *Ta'āmul*," *e.g.*, clothes and household goods. This is the view of Muḥammad, and the *fatwá* is in accordance therewith . . . .

In the *Bazzāziyyah* it is laid down that the *waqf* of woollen clothes for the poor is valid.

XXX. The Radd-al-Muḥtār (*III*, *p.* 406, *Edition Cairo*).

"And is valid, etc., resting house": The apparent meaning is the validity of their *waqf* independently, and this is supported by the fact that in the *Fatḥ-al-Qadīr* which quotes the *Khulāṣah* this instance is enumerated along with the cases of the *waqf* of moveables with respect to which there was *Ta'āmul*. The commentator (author of the *Durr-al-Mukhtār*), therefore, ought to have mentioned this instance after the statement of the author (of the *Tanwīr-al-Abṣār*), "and moveables wherein there is *Ta'āmul*," so that it may not be imagined that it is a *waqf* subsidiary to the resting-house, as has been imagined by the author of the *Baḥr-al-Rā'iq* when he says, etc. . . . . . If he sells a disabled slave and buys with his price another in his stead, it is valid . . . . . Similarly water-wheels and implements may be sold and with their price may be purchased what is more beneficial to the *waqf*.

"As is valid the *waqf* of Mushā', etc.": and it will become unanimous by the decree of a judge. The divergence with regard to the *waqf* of Mushā' is based on the stipulation of delivery and its absence, because partition is its completion. Abū Yūsuf holds it valid because he does not make delivery a condition, and Muḥammad holds it invalid because of his making delivery a condition . . . . . and we have stated above that the occasion of the divergence is with respect to what is capable of division, unlike what is not capable of it, and the latter is, therefore, unanimously valid except in the case of a mosque or a cemetery.

"Because it is a case for *ijtihād*": *i.e.*, *ijtihād* is permitted because of the absence of its being in opposition to any express text or *Ijmā'* (consensus of jurists).

"Therefore the Ḥanafī sectary etc.": therefore it is stated in the *Durar* in the Book on the "Duties of a Judge" where the discourse is upon a judgment of a judge contrary to his school that it means contrary to the principles of the school, *e.g.*, when a Ḥanafī gives judgment according to the school of al-Shāfi'ī. But if a Ḥanafī gives judgment according to the view of Abū Yūsuf or Muḥammad or others like them from amongst the companions of the Imām, then it is not a judgment contrary to his opinion.

"Two opinions, both of which are pronounced correct": *i.e.*, where the words whereby the correctness is pronounced are equal; otherwise it is decidedly preferable to follow that which is more emphatic in the pronouncement of the correctness, *e.g.*, when one of the two opinions is pronounced correct by the employment of the expression "it is correct," and the other by that of the expression "in accordance therewith is the *fatwá*," the latter is the stronger. Similarly, if one of them occurs in the texts or in the "Conspicuous reports," or is adopted by the majority, or is more suitable to the people, then if this and the view opposed to it are both correct, it is decidedly preferable to adopt it, as already stated at the commencement of this work.

"One of them": *i.e.*, any of the two opinions he likes, but if he decides a particular case according to one of them, he has not the option of deciding that very case according to the other view. The Muftī is like the judge in this respect. He should keep in view what is more convenient and advantageous. This is the meaning of the dictum that the Muftī gives his *fatwá* in accordance with what is beneficial, *i.e.*, advantageous in a religious, not temporal, sense.

"Every moveable independently": both disciples are agreed as to the validity of the *waqf* of those moveables which are subsidiary to land; just as there is no difference of opinion as to the validity of *waqf* of implements of warfare or of war-horses, because of the well-known traditions to that effect. The difference of opinion is with reference to the lawfulness of a *waqf* of other kinds of moveable property. For according to Abū Yūsuf, *waqf* of such moveables is not valid; whereas according to Muḥammad those moveables, wherein there is *Ta'āmul* may lawfully be made *waqf* of. This view has been adopted by the majority of jurists of all countries as is mentioned in the *Hidāyah*; and it is the correct view as is mentioned in the *Is'āf*, and this is the opinion of the majority of the masters as is mentioned in the *Ẓahīriyyah*; for analogy (*qiyās*) may be abandoned in consequence of *Ta'āmul*. The *Mujtabá* quotes from *al-Siyar* that according to Muḥammad the *waqf* of moveables is unrestrictedly valid; but that according to Abū Yūsuf, the *waqf* of those moveables is valid as to the dedication of which there is *Ta'āmul*. Fuller details of this will be found in the *Baḥr*. What has first been

stated however [as being the opinion of the two disciples] is that which is generally known as being theirs.

"*Waqf of Dirhams and Dīnārs*": The opinion that the *waqf* of dirhams and dīnārs is valid is attributed in *al-Khulāṣah* to al-Anṣārī, who was one of the companions of Zufar. In the Fatāwá of Qāḍī Khān this has been attributed to Zufar (himself) when he says, "It is reported from Zufar." This is the statement of *al-Shurunbulāliyah*. The author in his *Manḥ* says:—As *Ta'āmul* has arisen in the Turkish dominions and other countries in our days to make *waqf* of dirhams and dīnārs, these have come under the dictum of Muḥammad according to which is the *fatwá*, *viz.*, that any moveable wherein there is *Ta'āmul* may be made *waqf* of as will readily be understood. There is no necessity, therefore, to say that the validity of *waqf* of these things rest specially on the authority of Zufar as reported by al-Anṣārī, and God knows best. Our master, the author of the *Baḥr*, has given his decision as to the validity of *waqf* of dirhams and dīnārs without making any mention of any divergence of opinion. Here ends what is mentioned in the *Manḥ*. Al-Ramlī thus comments on this: To place dirhams and dīnārs under the category of those moveables which it is the practice to make *waqf* of, is not without some doubt, since they are of those things from which no profit can be derived, keeping them at the same time in the possession of the dedicator, and the fact that the author of the *Baḥr* has already given his *fatwá* (decision) as to the validity of *waqf* of those things without mentioning any difference of opinion does not show that these are included in the things to which the dictum of Muḥammad (according to which *fatwá* is given) applies, *viz.*, the validity of making *waqf* of articles wherein there is *Ta'āmul*; since it is possible that he had adopted the opinion of Zufar and decided accordingly. The argument cited in *al-Manḥ* and based on the question of the cow which is mentioned below is rebutted by what we have already said, for it is possible to make use of its milk and butter and yet to preserve its substance. However, if the decision of a judge is obtained, every difference will be removed. End of the passage in an abridged form. I say coins cannot be made determinate by the simple act of specifying them, therefore although it is not possible to make use of them and retain the original, yet their substitute always exists since they cannot be made specific. They are, therefore, as good as if they had permanent existence, and there is no doubt as to their being moveable property. Since there has already been *Ta'āmul* with respect to them, they are included among the things which Muḥammad had declared to be lawful to make *waqf* of. It is for this reason, seeing that Muḥammad had given examples of things with respect to which *Ta'āmul* had arisen in his age, the author of the *Fatḥ-al-Qadīr* says that some doctors of law have added to those mentioned by Muḥammad other moveables when they saw

the prevalence of *Ta'āmul* with respect to them in their time. He (the author of *Fatḥ-al-Qadīr*) mentions the case of dedicating a cow stated below and that of coins and measurable articles when he says, "It is stated in *al-Khulāṣah*: a man makes *waqf* of a cow on condition that the milk and butter obtained from it should be given to wayfarers. It was answered, "If this happens in a place where *waqf* of such things prevails it is expected that such *waqf* should be valid." It is related of al-Anṣārī, a disciple of Zufar, that he was asked concerning a man who made *waqf* of money or articles capable of being measured and weighed, whether his *waqf* was valid. He answered, "Yes." He was asked, "And how?" He answered, "The money should be laid out in business (*Muḍārabah*) and the income therefrom distributed in charity in the way laid down in the deed of *waqf*. Those articles which are capable of being measured or weighed may be sold, and their price given likewise in business or as capital stock." He adds that according to this analogy, it would be possible to make *waqf* of a measure of wheat on condition that it should be lent out to the poor, who do not possess seeds, so that they may sow them for themselves, and when it is harvest time the quantity lent out would be taken from them and afterwards given to other poor persons—in this way perpetually.

From this becomes evident the correctness of what the author has mentioned, *viz.*, their inclusion among the moveables whose *waqf* has been recognized in practice according to the dictum of Muḥammad, in conformity with which *fatwá* is given. That they should have specially ascribed it to Zufar in reporting it from him is because it (*waqf* of dirhams and dīnārs) had not become recognized at that time, and because he was the first to give it as his opinion that such *waqf* was valid. *Al-Nahr* says:—"According to the preceding dictum of Muḥammad it would not be lawful to make *waqf* of that, *i.e.*, *waqf* of wheat, in Egyptian lands as this is absolutely unknown. Yes, indeed, the *waqf* of dirhams and dīnārs is recognized in Turkish countries."

"Because analogy is abandoned in consequence of *Ta'āmul*": according to analogy *waqf* of moveables is not valid as perpetuity is a condition of *waqf*, whereas moveables cannot exist perpetually. *Ta'āmul* according to *al-Baḥr*, whose authority is *al-Taḥrīr*, means *the more frequent in use*. It is stated in the commentaries of al-Bīrī, quoting from the *Mabsūṭ*, "What is established in practice has the same authority as that which is established by a text (of the Qur'ān or traditions). A fuller discussion of this subject will be found in our treatise, entitled *Nashr-al-'Arf*, etc.—"Basing of certain rules on what is recognized in practice." It is evident from the case of the cow, that a new practice [which comes into existence at any time or place] is taken into account. It is not, therefore, necessary that the practice

should have existed from the time of the Companions. Such is also the evident conclusion from what we have already said that some doctors of law have added other moveables in which *Ta-'āmul* has arisen in their time. According to this, what is obvious is to take into consideration the practice in some place where, or at some time when, the practice came to be recognized and not otherwise. Thus the *waqf* of dirhams is practised in Turkish countries and not in our country, and the *waqf* of axes and spades was practised in the age of the ancients, but it is not heard of in our time. Therefore it would appear that it is not valid now, and that if it should be found rarely it should not be taken into consideration, since it has been already stated that *Ta'āmul* means "the more frequent in use." The reasoning is false. "In consequence of the saying of the Prophet": reported by Aḥmad, etc. "And household goods," *i.e.*, that from which some use could be had; thus it is a conjunction of a general term to a particular; so it includes what is used in the house, *e.g.*, household goods like beds, carpets, mats, other than those used in a mosque, vessels and cooking pots. Yes, the *waqf* of brass vessels have come to be recognized, and the ancients have expressly declared the validity of the *waqf* of vessels and cooking pots required for washing the dead.

"And this," *i.e.*, the validity of *waqf* of moveables recognized in practice.

"The *Baḥr* has assimilated boats to furniture": that is to say, it is not valid, but the Master of our Masters al-Sā'iḥānī says that they have recognized the practice of their *waqf*; so there is no doubt as to its validity.

It appears that the practice arose after the time of the author of *al-Baḥr*. And in *al-Manḥ* the *waqf* of a building without its site has been assimilated to moveables whose *waqf* has been recognized. Similarly the *waqf* of trees without the land, because they are moveables with respect to which there is *Ta'āmul*.

"It is valid to make *waqf* of woollen clothes": I say in our age, some of the Mutawallīs have made *waqf* of furs for the benefit of the Muezzins at night in winter. Such a *waqf* should be declared valid, especially according to what has been reported from al-Zāhidī. This quotation from *Sharḥ-al-Multaqá* should be especially considered, *i.e.*, what has been mentioned by al-Zāhidī in *al-Mujtabá* concerning the validity of *waqf* of moveables unrestrictedly according to Muḥammad.

. . . . "It is valid if they could be counted": This condition is based on the rule stated by Shams al-A'immah, *viz.*, when the object of *waqf* is stated, it is indispensable that indigence should be expressly mentioned, either actually, *e.g.*, the poor, or according to usage amongst people, *e.g.*, orphans or confirmed valetudinaries, because usually they are poor. Therefore it is valid

for the benefit of the rich and the poor amongst them, if they could be counted, otherwise for the poor only.

It is reported from Muḥammad that what cannot be counted is ten, and from Abū Yūsuf hundred, and that is the view accepted by some. Some say it is forty. Some say it is eighty. The *fatwá* is to the effect that it should be left to the discretion of the judge—*Is'āf* and the *Baḥr* (*Radd-al-Muḥtār*, iii, p. 409, Ed. Cairo).

XXXI. The Ṭaḥṭāwī (*II*, 539, *Ed. Cairo*).

The general view is that it is Muḥammad who holds the validity of the *waqf* of moveables whose *waqf* has been recognized and that Abū Yūsuf denies it. And it is reported in the *Mujtabá* that it is Muḥammad who holds the validity of the *waqf* of moveables unrestrictedly and Abū Yūsuf declares it valid when there is *Ta'āmul* respecting it. The apparent meaning of *al-Nahr* is to limit the validity of the *waqf* of moveables to the countries where their *waqf* has become recognized. This view has been controverted by Abū'l-Su'ūd, which see.

"To pass a decree with respect to it": *i.e.*, with respect to the *waqf* of dirhams and dīnārs, *i.e.*, their validity. "Like clothes": The case of woollen clothes mentioned below is special [their *waqf* being valid in consequence of later *Ta'āmul*].

"And furniture": it is that of which use can be made from amongst such moveables the practice of making *waqf* of which has not been recognized, *i.e.*, goloshes and mats on which people sit in a place other than a mosque and the like. In the *Baḥr* it is laid down that animals and gold and silver including ornaments were excluded [at the time of Muḥammad] from being fit subjects of *waqf*, because their *waqf* is not perpetual. In the *Sharḥ-al-Ḥamawī* it is laid down that *Ta'āmul* having arisen regarding the *waqf* of tools of ironsmiths, their *waqf* should be valid.

"And this," *i.e.*, the details stated above. "In the *Baḥr* *waqf* of boat has been assimilated to furniture": as there was no practice of making *waqf* of it in the time of the author of *al-Baḥr*. But in our time the practice has arisen with regard to ships of the Red Sea. For some of them are made *waqf* of for transporting grains destined for the two Sanctuaries (*i.e.*, Mecca and Medina) . . . . "It is valid to make *waqf* of woollen clothes for the benefit of the poor."

XXXII. The Fatāwá 'Ālamgīrī (*II*, *pp.* 462, 464, *Ed. Calcutta*).

If the slave (*i.e.*, an endowed slave) is disabled from work the Mutawallī may sell him and buy with his price another slave instead. If he cannot find a slave in his stead for that

price, there is no harm in his adding to it something from the profits of the lands. Similar is the rule applicable to the case of beasts of burden, implements of husbandry when dedicated along with the land (p. 463).

If the slave is killed and the Mutawallī takes his blood-money, he should buy with it another slave; thus it is laid down in the *Fatḥ-al-Qadīr* . . . . As for the *waqf* of moveables independently, if they be horses or arms their *waqf* is valid. With respect to articles other than those, if they be things the practice of making *waqf* of which is not recognized, *e.g.*, clothes and animals, their *waqf* is not valid according to us. But if their *waqf* is recognized (*e.g.*, axes, shovels, a bier with its pall, such vessels and pots as are required for washing the dead, and copies of the Qur'ān), according to Abū Yūsuf their *waqf* is not valid, but according to Muḥammad it is valid, and the generality of jurists including the Imām al-Sarakhsī follow it. Thus it is laid down in the *Khulāṣah*, and this is the accepted view, and the *fatwá* is in accordance with the view of Muḥammad, etc. . . . . *Waqf* of a bier, etc. . . . . *Waqf* of Qur'ān, etc. . . . . *Waqf* of books, etc. . . . . *Waqf* of a cow, etc. . . . . valid like the *waqf* of the water of a public fountain. *Waqf* of a bull . . . . not valid. *Waqf* of building in land, etc. . . . . *Waqf* of shops in a bazar, etc. . . . . valid.

Waqf of slaves and slave-girls for the service of a resting-house, valid. As for the *waqf* of that from which no profit can be derived except by its destruction, like gold and silver and eatables and drinkables, its *waqf* is not valid, according to the generality of jurists; and by gold and silver is meant dirhams and dīnārs and what is not ornament. Thus it is laid down in the *Fatḥ-al-Qadīr*. And if a person makes a *waqf* of dirhams or what is estimated by measure or clothes, it is not valid, and it is said that where they have recognized it *fatwá* is given in favour of its validity. . . . . (Vol. II, pp. 462-64).

XXXIII. And it is laid down in the *Fatāwá* of Abu'l-Layth: when a person makes a *waqf* of a cow for the benefit of a resting-house, stipulating that what comes out of her in the shape of milk and butter should be given to wayfarers, some of our masters say, "If it was in a place where such a *waqf* prevailed, I should expect it to be valid"; but other jurists declare their validity unrestrictedly because the practice of making such a *waqf* has arisen in the countries of the Muslims (Vol. VI, p. 540).

THE ḤADĪTH.

XXXIV. THE 'UMDAT-AL-QĀRĪ (*Vol. VI, p.* 516, *Ed. Cairo*).

Text: Chapter on the waqf of beasts of burden, war-horses, camels, commodities, and coins *Commentary: i.e.*, this is a

chapter which explains the waqf of beasts of burden, etc. By this heading he indicates the validity of the waqf of moveables. The word *kurā'* means war-horses. The word *'urūḍ* is the plural of *'arḍ*, and it means commodities other than coin. The word *ṣāmit* is the opposite of *nāṭiq*. It is used here in the sense of money or coin.

Text: Al-Zuhrī was asked: A man dedicates a thousand dīnārs in the way of God and makes them over to his slave, a tradesman, for investment in some trade, the profits to go to the poor and his relations by way of charity. Can that man lawfully eat of the profits of the said thousand even if the profits had not been given in charity to the poor? He answered: He cannot eat anything out of it.

XXXV. The Fatḥ-al-Bārī (*Vol. II, p.* 40, *Ed. Cairo*).

[The *Fath-al-Bārī* reproduces with further details the remarks of the *'Umdat-al-Qārī* and replies to the objection of al-Ismā'īlī that no use can be made of coins without their substance being transformed into something else in the following terms:] To restrict the use of coins to the only way which he indicates can not be admitted, for it is possible to derive benefit from coins by making an advantageous use of them, *e.g.*, by making waqf of such coins as women are allowed to wear, in which case the waqf is valid as the original is detained while the women can derive benefit from them by wearing them when wanted.

XXXVI. Ibid. (*Vol. XI, p.* 31, *Ed. Delhi; p.* 408 *of the 'Umdat-al-Qārī*).

Text: If he makes a *ṣadaqah* or waqf of part of his property or part of his slaves or animals, it is valid. This chapter deals with the validity of the waqf of moveables....The reason of the validity of the waqf of *mushā'* and of moveables being inferred from the above text is the employment of the phrase "part of his slaves or animals." The following case will also be included, *viz.*, if he were to make waqf of part of a slave or of an animal....it is valid according to those who declare the waqf of moveables valid and the dedicator shall be referred to for the purpose of specification.

SHI'AH AUTHORITIES.

XXXVII. The Sharā'i' al-Islām (*p.* 318, *Ed. Cal.*).

On Commodate.

1. The subject will be treated in four sections—

1st—The lender....; 2nd—The borrower....; 3rd—The thing (*'ayn*) lent, which is anything that is lawful to make use of consistently with the preservation of its substance (*'ayn*).

IBID. (*p.* 334).

It is lawful to hire dirhams and dīnārs, if a legitimate use can be made of them consistently with the preservation of their substance (*'ayn*).

XXXVIII. IBID. (*p.* 234, *Cal. Edn.*).

Four conditions attach to the subject-matter—

1st—that it must be *'ayn* (defined specific property);

2nd—it must be a property which a Muslim may lawfully possess;

3rd—must be such as benefit may be derived therefrom consistently with the continued subsistence of the original; and

4th—delivery of its possession must be possible.

As an illustration of the first condition, waqf of what is not *'ayn* is not valid, for example *dayn*; also if he were to say, 'I make waqf of *a* horse or *a* camel or *a* house' without specifying it. It is valid to make waqf of land, clothes, furniture and lawful instruments, the principle being that waqf of anything from which lawful use can be derived consistently with the preservation of its substance is valid. Similarly it is valid to make waqf of owned dogs and cats as it is possible to derive benefit from them. But it is not lawful to make waqf of a pig as no Muslim can have it. Nor is it valid to make waqf of runaway slaves on account of the impossibility of delivery. Is it valid to make waqf of dīnārs and dirhams? Some say 'No,' and this is the more apparent view, because their only use is to spend them. But others say, 'It is valid,' for we may imagine them to have some use consistently with their preservation.

XXXIX. THE MASĀLIK-AL-AFHĀM (*Teheran Ed., p.* 365).

Is the waqf of dīnārs and dirhams valid? The more weighty opinion is that they are valid. Since these uses (*i.e.*, uses to which dirhams, etc., can be put without destroying their substance) are familiar and that there are more important ways of using them does not prevent their being made waqf of in this way.

MĀLIKĪ LAW.

XL. THE MUDAWWANAH (*Vol. II, p.* 103, *Ed. Cairo*).

I put the following question to Mālik, or it was put to him: A man makes waqf of a hundred dīnārs with the object of lending them to people who would return the same to the dedicator, and so on. Is *zakāt* to be paid on those dīnārs? He answered, "Yes, my opinion is that *zakāt* should be paid." I asked him, "What if a man were to dedicate a hundred

dīnārs to be distributed in the way of God, or for the poor and they remain for a whole year, is *zakāt* to be taken on them?" He answered, "No, these are all for distribution; they are not like the first."

XLI. The Mukhtaṣar of Sīdī Khalīl (*p.* 184, *Ed. Paris*).

Valid is the waqf of any property even when taken on hire and even if it were an animal or a slave, such as a slave dedicated for the service of the sick, provided no injury is intended to him thereby. As regards food grain and similar things there is some hesitation.

XLII. The Dardīr (*Vol. IV, pp.* 70 *to* 73, *margin, Ed. Cairo*).

It is valid to make waqf of any property in one's possession or anything capable of being possessed (*mamlūk*) even if conditionally, as when a man says, "If I come into possession of so and so's house, it shall be waqf"; or if the waqf be part of a joint property provided it is capable of division. The dedicator will be compelled to divide if so desired by his co-sharer.

Where no division is possible there are two opinions [*i.e.*, that it is valid and that it is not valid], both of which have been declared to be "preferable." Those who declare it to be valid, say that the dedicator would be forced to sell if his co-sharer so desired, and with the proceeds a property similar to the waqf should be purchased.

Under "property in one's possession or anything capable of being possessed (*mamlūk*)," the author means to include both possession of the substance and possession of the usufruct thereof. That is why he goes on to say, "even though[1]" the property indicated by *mamlūk* be "by hire," as when he rents a house for a number of years. In this case he can make waqf of the use of the house during this period. This is because perpetuity is not a condition of waqf as shall be stated below. The words "by hire" include the case of one who rents a house that has been made a waqf for a certain period. He can dedicate the use of it to any person other than the first during the said period. But the person for whom it is dedicated cannot himself dedicate the use of it, to which he is entitled, and that is because what is appropriated cannot be re-appropriated [by the beneficiary]. "And even though the property be an animal or a slave": both of these are included in the general term; that is to say, the waqf of this is valid and must be given effect to: and likewise clothes

[1] In imitation of the Arabic original the words of the text of the *Mukhtaṣar* are put within inverted commas to distinguish them from those of the commentary.

according to our school, "as dedicating a slave for the sick," that is for their services; provided that the master does not intend thereby to do injury to his slave, otherwise it shall not be valid. The same applies also to a slave-girl dedicated for the service of female patients, in which case it shall not be lawful for the master to have intercourse with her, because by dedicating her, her use passes to others, just as in the case of a slave-girl taken on loan or pledged. "As regards" the validity of things like food grain, the identity of which cannot be recognized if removed from one's sight, as for instance, "coins" (and this [*i.e.*, the validity] is the accepted opinion as indicated by the words of the author when treating of *zakāt*: "Zakāt is taken on 'Ayn, *i.e.*, gold or silver that has been dedicated for the purpose of giving it as free loans), or the non-validity of such things as inexpedient or illegal; "there is some hesitation," but it is said that this hesitation is as regards fungibles other than money, for as regards money there is no hesitation whatever, it being absolutely valid to make waqf of it as it is the express teaching of the *Mudawwanah* By waqf here is meant waqf for the purpose of lending out. The replacing of it by money of the same value is considered as "preservation of substance," but if it were to be dedicated with the condition that the identical coins should be preserved, it is not valid according to the unanimous opinion of the doctors as there is no legal advantage in such a waqf.

XLIII. The Dasūqī (*Vol. IV, p.* 73).

"By waqf here is meant waqf for the purpose of lending out".

By this he wishes to indicate that the hesitation is in respect of a waqf made with the intention of use being made of it and then replaced by coins of the same value; but when a waqf of it is made with the condition that the original should be preserved, as for instance, when it is dedicated for the decoration of shops, such waqf is unanimously forbidden and, if made, it would be invalid.

XLIV. The Dardīr (*Vol. I, p.* 412, *margin*).

Zakāt should be taken by way of obligation on 'Ayn, *i.e.*, gold or silver coins, that has been appropriated for the purpose of being lent out; that is to say, the Wāqif or the Mutawallī should pay the Zakāt out of the money itself, if one year has passed from the time it has come into his possession.

XLV. The Dasūqī (*ibid.*).

The words "dedicated for the purpose of lending" means that it is dedicated so that the needy may receive it as a free

loan, and when they can afford to do so replace it by paying the value. It is all the same if dedicated to specified persons or persons not specified. The author's statement is based on the accepted opinion that gold and silver coins may be made waqf of for the purpose of lending.

XLVI. Dasūqī (*ibid.*).

The gist of the whole matter is this, that as for coins dedicated for the purpose of lending, if no one takes them out as a loan, the Mutawallī or the Wāqif should pay Zakāt on them every year, if one whole year passes since they come into his possession.

SHĀFI'Ī LAW.

XLVII. The Ghāyat al-Bayān (*Cairo Edition, p.* 228).

To constitute a valid waqf the property appropriated should be a definite specific substance (*'ayn*) capable of being made use of while the original remains; it should not be made dependent on a condition; and the person or object for which it is made should be in existence at the time.

XLVIII. The Sharḥ Ghāyat-al-Bayān (*p.* 228).

Chapter on Waqf.

Lexicographically it means detention.

In law it means the detention for a lawful object of property, from which it is possible to derive benefit along with the continuance of its original, by divesting the appropriator of his power of disposition. Its basis is the following tradition of Muslim: "When the son of Adam dies, his good work ceases except from three sources: (*a*) continuous charity, (*b*) or knowledge from which benefit is derived, (*c*) or a pious son praying for him." "Continuous charity" is construed by the Ulemas to indicate waqf. The property appropriated should be a definite specific substance capable of being made use of while the original remains. Therefore it would not be lawful to make waqf of musical instruments, a trained dog, grain, sweet-smelling gathered plants, nor the waqf of dirhams and dīnārs. But it would be lawful to make waqf of landed property, moveables, undivided shares, divided property, snares, springs, wells, fruit trees, animals for their milk, wool, hair and eggs, bull for covering the cows, etc.

HANAFĪ LAW.

XLIX. The Qudūrī (*pp.* 133 *and* 134).

....And the waqf of landed property is valid, and the waqf of what is capable of being moved and what changes in form is

not valid, except when there is Ta'āmul of the people regarding it. And Abū Yūsuf has laid down that when a person makes waqf of land with its cows and cultivators, if they are his slaves, it is valid. And Muḥammad holds that it is valid to make waqf of horses and arms.

L. The Jawharat-al-Nayyirah (*II, p.* 19, *Ed. Lucknow*).

"And waqf of landed property (*'aqār*) is valid," because it is lasting; "and waqf of what is capable of being moved and what is liable to change is not lawful"; since such property is not lasting, therefore its waqf is not valid.

Al-Khujandī holds that the waqf of moveables is not valid except (*a*) when subsidiary to something else, as when a person makes a waqf of land with the bulls and serfs for its purposes; then they become waqf along with the land as accessories; (*b*) or when the practice (*'ādah*) arises of making waqf of them, *e.g.*, a spade for digging graves or a bier and the pall of a bier.

If a person makes a waqf of standing trees it is not valid according to analogy, but it is valid according to Istiḥsān . . . It is stated in the *Wāqi'at* that when a person makes waqf of a bull in favor of the inhabitants of a village for the purpose of covering their cows, it is not valid because the waqf of moveables are not valid except of such whose waqf is recognized (Ta'āruf) and there is no recognized practice with respect to this. But it is valid according to al-Shāfi'ī.

And Muḥammad holds that it is valid to make waqf of horses and arms, etc., and they say that Abū Yūsuf agrees with him and this is due to Istiḥsān according to him. And Muḥammad has laid down that the waqf of moveables wherein there is Ta'āmul is valid, *e.g.*, pickaxes, spades, shovels, saws, a bier and its pall, cauldrons, copies of the Qur'ān and books. According to Abū Yūsuf it is not valid, but the majority of jurists of all countries follow the view of Muḥammad. And when a waqf is valid, its sale is not valid nor its transfer, except when it is Mushā' according to Abū Yūsuf.

LI. The Fatāwá al-Sirājiyyah (*pp.* 120-121, *Ed. Lucknow*).

Waqf of moveables is not valid except as accessories (to land), or except when it is recognized in practice. A man makes waqf of his horse for use as a led-horse in the way of God. This is valid having regard to recognized practice. And similarly if he makes waqf of weapons (of war) or horses or of copies of the Qur'ān, or if he makes waqf of land with the right of way or of implements of husbandry, this is valid.

LII. The Sharḥ al-Wiqāyah (*Ed. Cal., pp.* 256-257).

It is the opinion of Muḥammad that it is valid to make waqf of such moveables with respect to which there is Ta'āmul such as a pickaxe, a spade, a shovel, a saw, a bier and its pall, a pot, a cauldron and a copy of the Qur'ān. The majority of the jurists of various countries have accepted his view.

LIII. The Zakhīrat-al-'Uqbá (*ibid.*).

Muḥammad says, as for those moveables the waqf of which has been recognized by people, it is valid to make waqf thereof by way of Istiḥsān, as in the case of the things mentioned in the text. Those things the waqf of which has not been recognized in practice cannot be made waqf of, *e.g.*, clothes, animals and other household goods. The view of al-Shāfi'ī, Aḥmad and Mālik is that the waqf of moveables independently is valid, provided that the moveable is something of which use can be made consistently with the preservation of the original, of whatever nature it may be.

They are unanimous that it is not valid to make waqf of dirhams and dīnārs. The reason of al-Shāfi'ī's view rests on the analogy of land and war-horses, the quality common to both being the possibility of making use of them consistently with the preservation of the substance. But we (Ḥanafīs) say that this analogy is weak, as it is the analogy of what endures on what does not endure. Thus it is stated in the *Bayāniyyah*. It is gathered from the *Mi'rājiyyah* that in the case of the two precious metals, that which is not valid to make waqf of is the coined dirhams and dīnārs. But when made into ornaments, it is valid to make waqf of them, according to Aḥmad and al-Shāfi'ī, seeing that Ḥafṣah, the daughter of 'Umar and wife of the Prophet, bought ornaments for 20,000 dirhāms and made waqf of them for the benefit of the womenfolk of the family of al-Khaṭṭāb Hence she paid no poor-rate on them. According to Aḥmad, it is not lawful to make waqf of these even, and he denies the authority of this tradition. It has been said, if we allow the hiring of dirhams and dīnārs as valid, it is equally valid to make waqf of them. But this is of no weight. Here ends the quotation from the *Dirāyah*. And it has been said in the *Bazzāziyyah*, that if a man makes waqf of dirhams and dīnārs .... it is valid ..... In the Fatāwá of Qāḍī Khān, it is stated from Zufar that a man makes waqf of dirhams ... it is valid. But we say that the way to reconcile what has been mentioned in these two authentic works, *viz.*, that it is lawful to make waqf of coins and food grains with what has been mentioned in the commentaries on the Hidāyah, *viz.*, that it is not valid, is that the commentators could not imagine that it is possible to make use of them consistently with the preservation of the original, whereas the propounder of the view expressed in these two

works does imagine it to be so. But the true answer is that there is no need to reconcile the two views, as the propounders of the two views belong to rival schools [*i.e.*, the Ḥanafī and the Shāfi'ī] as you see; whereas reconciliation is only necessary when it is a question of views propounded by people belonging to the same school. The matter requires critical consideration.

LIV. The Fatāwá Khayriyyah (*Vol. I, p.* 132, *2nd Ed., Govt. Press, Būlāq, Cairo*).

The following question was asked: A man makes waqf of a moveable in which there is Ta'āmul for the benefit of his minor children and after them for a perpetual charitable object. He then appoints a testamentary guardian for his above-mentioned children, and directs him to look after the subject-matter of the waqf and protect it till one of the children attains the age of discretion. Then the dedicator dies, and the testamentary guardian performs his duties and then dies without specifying the waqf property, and it perishes. Then one of the children attains the age of discretion. Will the guardian be held responsible for indemnity realizable from his estate or will he not? . . . . . .

Answer—. . . . . You know that this testamentary guardian was the Mutawallī of the said waqf. Now it is expressly laid down that in case the Mutawallī dies without specifying the proceeds of the waqf, he is not liable for indemnity. But in case he dies without specifying the money of *istibdāl* he will be liable, and from his liability for money of *istibdāl* it has been inferred that he will be liable for indemnity also when the subject-matter of waqf is dīnārs.

LV. The Tanqīh-al-Ḥāmidiyyah (*Vol. I, p.* 120, *Edn. Cairo*).

Question.—It was asked: A woman makes waqf of an ascertained amount of dirhams for the benefit of two children of her daughter . . . . Is such a waqf valid?

Answer.—Yes, the Grand Muftī of the Ottoman Empire, the late 'Alī Effendi, had given fatwá of its validity. And it is stated in the *Fatāwá Qāḍī Khān* amongst the waqf of moveables: Zufar was asked about a man making waqf of dirhams or grain or what is weighable or measurable. He said it is valid . . . . A similar statement is to be found in the *Durar* quoting the *Khulāṣah* from al-Anaṣārī who was a companion of Zufar

LVI. The Fatāwá Qunyah (*p.* 196, *Edn. Calcutta*).

A man makes a waqf of 150 dīnārs for the benefit of the sick. The gold should be handed over to a man in order to

make it yield profit by being employed in business (*muḍārabah*[1]), the profit being given to the sick.—*Muḥīṭ*. The waqf of dirhams and articles sold by measure and weight is valid in the same way.

LVII. The Fatāwá Bazzāziyyah (MS. *in the Calcutta Madrasah, p.* 319).

If a man makes waqf of dirhams and dīnārs or of food grains or of articles sold by measure or weight, it is valid. The coins and the price of what is not coin (*e.g.*, articles sold by measure or weight), after their sale, should be invested in *muḍārabah* or *biḍā'ah*[1] and the profit arising therefrom should be spent for the purposes of the waqf.

LVIII. The Wāqi'āt-al-Muftīn (*p.* 74, *Cairo Ed.*).

It is reported from Zufar that when a person makes a waqf of dirhams or grain or what is estimated by measure or weight, it is valid.

Marginal note 1.—It is laid down in the *Fatāwá Nāṭifī* on the authority of Muḥammad b. 'Abd-Allāh al-Anṣārī, one of the companions of Zufar, that the waqf of dirhams and grain and what is estimated by measure and weight is valid.

LIX. Fatāwá Mahdiyyah (*Ed. Cairo*).

Question.—The following question was asked on behalf of the agent of the Finance Department:—A native of Mecca named Aḥmad Jalabī is the Mutawallī of a house which is a private waqf. The house is acquired by the Government to include it in the palace of the wife of our late great ruler; and as it is a private waqf, the payment of its price has been withheld for the purpose of its exchange (*istibdāl*). Now the agent of the owner of the above-mentioned house has submitted a petition to the effect that the remaining portion of the waqf buildings stands in need of necessary repairs, which would cost more than 4,000 qirsh, the price of the above-mentioned house; and he (the agent) prays for the payment of that price for the purpose of repairing the above mentioned places because of the principle of preserving the waqf at the sacrifice of a part . . . . . .

Answer.—When a piece of waqf land has been exchanged in a valid and lawful way, or when a usurper usurps it and pays its value, neither the price nor the value of the land should be

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1 For the technical meaning of *muḍārabah* and *biḍā'ahdā*, see the Chapter on Partnership in the *Hidāyah* or any other work on Muslim Law.

spent for repairs, but another piece of land should be purchased which should be waqf in the stead of the original waqf. The price of the débris, however, when sold on account of the building being difficult to restore or through fear of loss of the débris, may be spent for repairs and the Mutawallī of the waqf may take the price and then spend it for repairing the rest of the waqf property. In the *Tanqīḥ-al-Ḥāmidiyyah* it is laid down at the beginning of the chapter on waqf after a statement from the *Fatāwá-'l- Lutfī*: Its logical conclusion is the validity of expending the money obtained in exchange, for repairing the waqf. The matter requires critical consideration. And exchange (*istibdāl*) and sale are one and the same as regards their final result, and God knows best. I say that Shaykh Ismā'īl has also answered similarly in his *Fatāwá*, viz , that repairs should be made out of the money obtained in exchange, and borrowing should not be resorted to, as it is unnecessary, seeing that there is money belonging to the waqf. And what has been stated in the *Fatāwá-'l-Lutfī* is as follows: And sometimes the dirhams obtained in exchange are spent in making necessary repairs of the waqf with the permission of a Cadi authorized to give it; and they are replaced out of the profits of the waqf after the repairs in order to purchase with it something which would be waqf like the original waqf, and it will not be property belonging to the beneficiaries of the waqf, nor inheritance. (Vol. II, p. 524).

LX The validity of waqf of Mushā' even when capable of division.

The following question was put on behalf of the Bayt-al-Māl of Egypt: A woman makes waqf of half of her house in Cairo for some purpose, and the other half she gives to her husband . . . . . what is the order with respect to it ?

Answer.—There is divergence of opinion concerning the waqf of Mushā' ; but the judge may decree its validity relying on the view of the second Imām, Abū Yūsuf. Therefore when the fact of the woman's having made waqf of half the house is proved, fulfilling its conditions, the judge is at liberty to decree the validity of the waqf and its bindingness. (Vol. II, p. 541).

LXI. *Question.*—A man makes waqf of half a public bath, which is Mushā', incapable of division, for his own benefit for life, then for the benefit of his children, etc . . . . *Answer.*—There is divergence of opinion regarding the waqf of Mushā'. If a decree is obtained in favour of its validity, it is given effect to, as there are two views with respect to it, both of which are pronounced correct. This divergence of opinion is with regard to what is capable of division. As for that which is incapable of division as in the present case, it is valid unanimously except in the

case of a mosque and a cemetery, as it is expressly laid down in the books of the school. (Vol. II, p. 545).

LXII. *Question.*—Is exchange permissible [in Egypt] when the dedicator has expressly forbidden it and there is no advantage?

Answer.—(The Fatwá also includes the names and seals of Shaykh Khalīl-al-Rashīdī, Registrar of Fatwás, and Sheikh Muḥammad al-Manṣurī, the Hanafite.) There is an old divergence of opinions amongst the Ulemas regarding the exchange of waqf in the absence of any stipulation to that effect made by the dedicator. But the practice of the Cadis of Egypt is not to permit exchange at all without the sanction of the Sultan, thus acting according to what is known, viz., their being forbidden to do so. A Cadi's office demands particular regard to time, place and the circumstances of the case. A Cadi's order will not take effect with regard to a question which he is forbidden to deal with. Thus a Cadi has not the power of making exchange of the above-mentioned waqf without the sanction of some one having the authority to do so, specially in the absence of any advantage and the prohibition of the dedicator to exchange it. For verily the stipulation of the dedicator is like the express ruling of the law. It is not permitted to contravene his stipulation without any legal ground. (Vol. II, p. 559.)

LXIII. The following question was asked by the Pension Department:—The children of Sheikh 'Alī Khalīfa, one of the Ulema, his wife and an Abyssinian freed woman, have certain stipends granted to them and a share of the *iltizām* land, and they intend to make waqf of the same and the command of the sovereign has been issued to give effect to it. Amongst the children there are minors. Having regard to the text of the order is there any legal impediment in the way of making waqf of the shares of the five adult children of the Shaykh, etc.?

Answer.—Making waqf of *iltizām* lands and stipends from the Bayt-al-Māl payable to persons to whom they are due is of the nature of *irṣād*. Therefore it is valid by command of the person authorized to regulate its expenditure [i.e. the sovereign]. So when the person so authorized permits the person in whose name is the grant and who is adult, to make waqf of it in the above-mentioned way, the waqf will take effect in the terms of the order; and *irṣād* is governed by the same principle. God knows best. (Vol II, p. 639).

LXIV. The following question was asked by the officer in charge of the Bayt-al-Māl:—Muḥammad Ṣādiq died leaving the Bayt-al-Māl as his heir; and amongst the things left by him, a document is found to the effect that he makes waqf of a quantity of copper or copper utensils, etc., for a certain purpose.

Now is it lawful to sell it, or is it waqf, when what is stated above is proved?

Answer.—There is divergence of opinion as regards the validity of the waqf of moveables But the correct view followed by the majority of jurists is the validity of the waqf of that with regard to which there are Ta'āmul and usage (*'ādah*). Therefore of the articles stated above with respect to whichever of them there is Ta'āmul, it is valid to make waqf of them; while those with respect to which there is no Ta'āmul, their waqf is not valid. (Vol. II, p. 655).

LXV. Our most learned master was questioned concerning a dedicator who had stipulated in his waqf its cancellation or ratification. This stipulation was called into question and the person criticizing it wanted to render the waqf null and void on account of the stipulation, saying that cancellation amounts to nullification, and thus such a stipulation renders the waqf null and void; but the judge decrees the absence of nullification and declares the waqf valid. Is it permissible after this for another judge to declare the waqf invalid, or to give a fatwá in favour of nullification or not?

He answered:—The above-mentioned waqf is valid, and such is the actual practice, even though no judge had decreed its validity. But the stipulation of the dedicator reserving to himself the power of cancelling and nullifying the waqf, is an invalid stipulation, according to the accepted view adopted for fatwá; and what has been reported from the chapters on waqf of Hilāl and Khaṣṣāf to the effect that a waqf is rendered null by such a stipulation is contrary to the accepted view adopted for fatwá. This has been clearly stated by the most learned doctor Qāsim b. Qutlubghā and the Shaykh al-Tūsī in their collections of *Fatāwá*. And this has been reported by al-Ṭarsūsī from the *Tātārkhāniyyah* and the *Fatāwá 'l-Kubrá*. Furthermore, after a judge had decreed its validity it is not lawful to give fatwá in favour of its nullification and such a fatwá will not be acted upon, and God knows best.

The learned have expressly declared that when there is a difference of opinion amongst the jurists, fatwá will be given in accordance with that view which is more favourable to the waqf. And the current practice is the validity of waqf containing such a stipulation; for frequently stipulations like this are met with in waqfs whose validity is nevertheless maintained; the dedication is acted upon but the condition is ignored. Therefore the view on which reliance ought to be placed is the view in favour of the validity of waqf. (Vol. II, 753).

LXVI. The following question was asked by the Cadi of Suyūṭ on the 24th Muhurram, 1292 A.H:—A man owned a mill, a glass factory, both the sites and the buildings, and certain

shares in date-trees planted in *Khirāj* land on a permanent basis. He made waqf of the property owned by him as described above, a waqf taking effect from the year 1273 A.H. for the benefit of a mosque which he commenced building .... Is the above-mentioned waqf valid?

Answer.—Yes, the above-mentioned waqf is valid on account of existing practice, in addition to their having been Ta'āmul with regard to the waqf of buildings and trees planted in land taken on a permanent basis without the land. Such is the case when there is no other impediment. (Vol. II, 754).

LXVII. *Answer.*—When the waqf buildings fall into ruins and stand in need of necessary repairs, the Mutawallī is not allowed to spend anything out of the income, for the benefit of the beneficiaries, till he has made the necessary repairs, even if the dedicator made no stipulation to the effect that the Mutawallī should first of all devote the income of the waqf to repairing it. For preference is given to this over the beneficiary without there being any stipulation. If there is any such stipulation, *á fortiori*, preference will be given to repairs. Rather when there is such a stipulation, the Mutawallī is bound to reserve funds for future repairs, even though the waqf property may not stand in need of repairs in the present. Such is the accepted view of the jurist Abu-'l-Layth. Thus it is laid down in the *Tanqīḥ al-Ḥāmidiyyah* on the authority of the *Ashbāh*, that when the dedicator stipulates that preference should be given to repairs and the balance should remain for the beneficiaries, as is the case with the waqfs of Cairo, it is incumbent on the Mutawallī to reserve an amount sufficient to meet any future demand for repairs. (Vol. II, 805).

LXVIII. *Answer.*—There is divergence of opinion regarding the validity of the waqf of buildings and trees without their sites. But the existing practice is to decree its validity as there is Ta'āmul and recognized practice concerning it. (Vol. II, 822).

LXIX. The following question was asked by the mayoralty on the 24th Jumādá I, 1279:—The benefit of the ruling of law is sought with respect to the sale of a certain amount of money which was payable from a certain department of the Bayt-al-Māl to a woman named the Abyssinian Nasūkh, who is dead. The above-mentioned department had placed the money with the Medjidié &c. A man proved himself to be the heir of that woman after her death by decree of the Cadi. Now a Christian claims to have bought the amount from the aforesaid heir and demands the amount and its interest.

Answer.—The proceedings in this case from beginning to end are not in accordance with the requirements of law; and the sale by her heir of the amount with the Company and the

Bayt-al-Māl payable to the Abyssinian Nasūkh is not valid, under the circumstances, whether it is *dayn* or *'ayn* But granting that the amount was the woman's own property, and that it devolved on her heir by way of inheritance, even then the sale is bad. The contract of sale should be rescinded, and its equivalent should be returned to the purchaser, since the transaction which has taken place is sale. This is the requirement of law. But the person to whom the amount with the Company or the Bayt-al-Māl is due should take delivery of it himself. (Vol. III, p. 163).

LXX. The Ashbāh, &c.

Know that in law many questions depend upon a consideration of usage (*'Ādah*) or recognized practice (*'Urf*). So much so that they [jurists] have made it a principle [of jurisprudence] ..... And several questions are concerned with this rule:—(1) What establishes usage (*'Ādah*)? There are several minor questions connected with it: (*a*) There is difference of opinion concerning usage as regards menstruation, Abū Ḥanīfah and Muḥammad holding that usage is not established except by two instances. Abū Yūsuf, on the other hand, holds that a single instance establishes it, and they [jurists] say that the fatwá is in accordance with this .... (*b*) Training a hunting dog to abstain from devouring its prey so that abstention becomes a habit (*'Ādah*) with him. This is established by his abstention from devouring three times (pp. 58-59, *Ed. Cal.*).

LXXI. Durr-al-Mukhtār.

The sale of written orders issued by the Dīwān to the Governors for the payment of certain sums of money is not valid, unlike the sale of the shares of the Imāms [which is valid], because in this case the money derived from the waqf property exists, while in the other case it is not so.—*Ashbāh* and *Qunyah*. The meaning is that it is lawful for the beneficiary to sell his bread before he takes delivery of it from the supervisor. Comments of the *Radd-al Muḥtār* on the above quotation from the *Durr-al-Mukhtār*: "Unlike the sale of the shares of the Imāms": shares, *i.e.*, fixed stipends or rations out of the waqf, *i.e.*, their sale is valid. This is contrary to what is laid down in the *Ṣayrafiyyah*. Its author was questioned as regards the sale of a fixed stipend or ration. He answered in the negative.—Taken from the margin of the *Ashbāh*. I say that the following is the text of the *Ṣayrafiyyah*:—He [the author of the *Ṣayrafiyyah*] was questioned as to the sale of a fixed stipend or ration. He said it is not valid. For either the possessor of the *ḥazz* sells what is stated in it or the *ḥazz* (ticket) itself. There is no ground for the validity of the first as it would be the sale of something which he does not possess Nor is there any ground

for the validity of the second, as this much paper has no legal value, unlike an order on a governor, because that piece of paper has legal value. (Vol. IV, p. 19).

LXXIA. Is void the sale of property (Māl) which has no legal value (Mutaqawwim), *e.g.*, wine, pigs, etc. A property having legal value is that from which lawful profit can be derived in accordance with the Sacred Law. (IV, p. 155).

LXXII. Lawfulness is the original character of things. (IV, 273).

LXXIII. The usage (*'ādah*) at that time was such. It has changed, therefore the ruling has changed. Change of usage necessitates change of rule based on tradition, so much so that were the Prophet alive, he would expressly lay it down. Rules of law are, therefore, based on recognized practice; regard should be had to the practice of the age in question. It is quite clear that these rules are based on recognized practice; therefore in every clime and every age regard should be had to the practice of the people. (IV, 293.)

LXXIV. A man gives his capital to be employed in *muḍārabah* to an ignorant person. It is lawful for him to participate in its profits unless he becomes aware of their being acquired by unlawful means.

Comments of the Radd-al-Muḥtār on "acquired by unlawful means."

This question has been clearly explained in the *Tātārkhāniyyah* where it is stated: "A man acquires money by unlawful means and then he purchases something with it. This may happen in five ways—(1) He delivers those very dirhams to the vendor first of all and then buys something of him with that money; (2) or he purchases the article in question before paying the price with that money and does so afterwards; (3) or he purchases the article before delivering that money and pays other dirhams; (4) or he purchases without specifying any money and pays those dirhams; (5) or he purchases with other dirhams and pays those dirhams; Abū Naṣr says that the transaction is good and it is not necessary for him to give Ṣadaqah except in the first case. This is the view adopted by the jurist Abu-'l-Layth. But this is contrary to the "Conspicuous Report." For it is laid down in the *Jāmi'-al-Ṣaghīr* that if a man usurps a thousand and buys a slave-girl with it, and sells it for two thousand, the profit should be given in charity (Ṣadaqah). Al-Karkhī says that the transaction is not good in the first and second cases but it is

good in the last three. Abū Bakr says that it is not good in all the cases, but the fatwá nowadays is according to the view of al-Kharkhī in order to free people from narrow restrictions. In Walwālijiyyah it is stated that some of the jurists say that the transaction is not good in all the cases, and that is the select view, but the fatwá to-day is according to al-Karkhī's view in order to free people from narrow restrictions, unlawful gain being very common nowadays. (Vol. IV, 340).

LXXV. But you should accept what is in the *Fatāwá Qāḍī Khān*, for verily Qāḍī Khān belongs to the class of people competent to express opinion concerning accuracy and preference. (Vol. IV, p. 385).

LXXVI. And this [rule] changes with the change of time and place, as we see. I say, the ground on which the rule was based was fear, which is likewise absent on account of merchant vessels known in our days as steam-boats, because there is a strong presumption of safety with regard to them, so much so, that no merchant nowadays feels secure unless he ships his goods in them. When the ground is no longer existent, the rule also disappears. For, we have said before, and it will be stated later on also, that regard should be had to the recognized practice concerning the protection of deposits. Now that the recognized practice is such, it should be said that there is no difference between travelling with the deposit by land and travelling with it by steam-boat. (Vol. II, 334).

IBID. (*p.* 309).

LXXVII. "Al-Shāfi'ī states absolutely that a creditor may take what is due to him as regard things not of the same nature as what he had given his debtor," that is to say, in either money or commodities; for as regards money, it is permissible to take it according to our school, as stated previously. Al-Quhistānī says: In this there is an indication that he may receive payment in things not of the same nature, similar in the possession of a value. This is when of greater convenience, so that we may adopt it, although not the opinion of our school, for, as al-Zāhidī says, a man may be excused if he were to follow this under necessity.

LXXVIII. THE RADD-AL-MUḤTĀR (*III*, *p.* 376).

The substance of all this is that the reason given here on the authority of al-Hidayah is based on the principle that "all things are originally lawful." This is the opinion of the Mu'tazilah.

IBID. (*p.* 377).

To ascribe the original lawfulness of things to the Mu'tazilah is at variance with what is stated in books on the Principles of Law; for, in the *Taḥrīr* of Ibn-al-Hammām it is stated that that all things are originally lawful is the authoritative view of the Ḥanafīs and Shāfi'īs generally. It is also stated in the commentary on the "Principles" (*Uṣūl*) of al-Bazdawī by al-'Allāmat-al-Akmal: The majority of our doctors as well as the majority of the Shāfi'ī doctors say that all things which it is permissible that Law may allow or forbid, are, before the law speaks, lawful, for lawfulness is the original property of things; so that it has been declared permissible for one who has not heard of the law to that effect to eat whatever he likes. And it is to this that Muḥammad alludes when he treats of compulsion. He says: "the eating of what is dead and the drinking of wine have not become unlawful except by the prohibition." So he makes lawfulness to be the original state of things and unlawfulness only an accident.

LXXIX. THE NŪR-AL-ANWĀR (*p.* 221, *Ed. Lucknow*).

And the condition of a valid *ijmā'* is the assemblage of all; and the dissent of one is an impediment like the dissent of the majority, *i.e.*, if at the time of the meeting of the *ijmā'* one man expresses his dissent, his dissent will be taken into consideration and the meeting of the *ijmā'* will not be held because the word "people" in the saying of the Prophet, "My *ummah* (people) will never agree upon an error" embraces all; so it is possible the right be with the dissenter.

Note.—"Assemblage of all," *i.e.*, (*a*) all the Mujtahids; (*b*) and it is said that the least number whereby it (valid *ijmā'*) is held is three and al-Sarakhsī inclines to this view because it (the number three) is the least number which connotes the idea of a multitude (*jamā'ah*): (*c*) and it is said that it (the number necessary for a valid *ijmā'*) is two, because it (two) connotes the idea of plurality; (*d*) and it is said that if only one Mujtahid is to be found his opinion will amount to an *ijmā'* because the word (*ummah*) 'people' becomes applicable to him when he is the only Mujtahid; as God said, "Verily Abraham was an *ummah* (people) devoted to prayer."

IBID. (*Lucknow Ed.*, *p.* 83).

The second kind comprises of the word "three" when applicable to words which are plural both in form and meaning, *e.g.* 'man,' 'woman,' when they are common nouns not preceded by the definite article denoting a class or species. To this class belongs also what is plural in meaning only, *e.g.*, nation,

tribe. The minimum to which these words may be applicable is "three," because the least number connoting the idea of plurality is "three" according to the consensus (*ijmā'*) of the lexicographers. Therefore if these words are applied to less than three individuals they would be deprived of their proper signification. Some of the companions of al-Shāfi'ī and Mālik have said that the least number implying plurality is two. Therefore it is the minimum number to which these words may apply. They rely on the saying of the Prophet, "Two and upwards make a multitude." The author replies to this by his statement that the saying of the Prophet, "Two and upwards make a multitude," applies to questions of inheritance and wills."

Note.—'Questions of inheritance,' *i.e.*, not to lexicology because the Prophet was sent for the purpose of delivering ordinances and not for the purpose of elucidating lexicology.

IBID. (*p.* 243).

Istiḥsān (liberal construction) is based on (*a*) tradition, (*b*) *ijmā'*, (*c*) necessity, and (*d*) latent analogy (*qiyās Khafi*). Manifest analogy (*qiyās jalī*) demands something, and (*a*) tradition, (*b*) *ijmā'*, (*c*) necessity, and (*d*) latent analogy demand its opposite. Then analogy (*qiyās*) should be noted upon, but recourse should be had to *istiḥsān* (liberal construction).

IBID. (*Lucknow Edn.*, *p.* 37).

The authority of the rule that a change of proprietorship causes a change of substance constructively is based on the following tradition: The Prophet visited Barīrah and she presented to him some dates, but there was a pot full of meat boiling, and the Prophet said to her, "Won't you let us have some of the meat?" She answered, "O Apostle of God, it is meat which was sent me by way of charity." He said, "It is charity for you, but present for us." He means, when you received it from the owner it was charity for you, if you give it to us it will be a present to us. From this is known that a change of proprietorship brings about a change of substance. Many questions are decided on this principle.

LXXX. DOCUMENT CONTAINING A LEGAL FATWÁ FROM THE GRAND MUFTI OF EGYPT.

Fee—Six Piastres.

To

His Excellency the Muftī of Egypt.

What is your opinion concerning the following case? An Indian of the Ḥanafī sect makes waqf of Government securities,

stocks and bonds known amongst Europeans as *Rente*, or of shares in trading companies, the practice of which has been recognized in our time in certain countries. Will such a waqf be valid and permissible in India if it is recognized in Turkey for instance, and is it valid to make waqf of pickaxes and shovels in our time? ..... HASAN BEY FEHMY, *Secretary to H.E. Ghāzī Mukhtār Pasha.*

The Answer.—Praise be to God alone, and peace and blessing be to the last of the Prophets . . . It is laid down by the Ulema that the subject of waqf must be property having legal value (māl mutaqawwim), provided it is land or moveable property with regard to which there is Ta'āmul. If, therefore, the said securities be property having legal value and there has been a practice of making waqf of them in the country of the dedicator, their waqf would be valid according to the opinion of Imām Muḥammad, like the waqf of dirhams and dinars the waqf of which is now recognized So also is the waqf of pick-axes and shovels when their waqf independently has been recognized according to the opinion of the above-mentioned Imām. This opinion has been adopted by the majority of jurists of various countries as stated in the *Hidāyah*, and this is the correct opinion as stated in the *Is'āf*, and it is the dictum of most doctors as stated in the *Zahīriyyah*. Thus it is laid down in the *Radd-al-Muḥtār* and it is expressly laid down in the commentary on the *Durr* that the fatwá is in accordance with this. As to the waqf of moveables accessories to land, it is valid without any difference of opinion between Abū Yūsuf and Muḥammad. The following occurs in the *Radd-al-Muḥtār*:—

"According to this, what is obvious is to take into consideration the practice in some place where, or at some time when, the practice came to be recognized and not otherwise. Thus the waqf of dirhams is practised in Turkish countries and not in our country, and the waqf of axe and spade was practised in the age of the ancients, but is not heard of in our time. Therefore it would appear that it is not valid now, and that if it should be found rarely it should not be taken into consideration, since it has been already stated that Ta'āmul means the more frequent in use. The matter therefore requires critical consideration."

Therefore the question turns as to whether there is recognized practice or not. Now as to shares in trading companies, their waqf is of the nature of waqf of *mushā'*; so if they are shares in landed property, their waqf is valid according to Abū Yūsuf and Muḥammad if they are not capable of being divided. But if they are capable of division, then the validity of their waqf is in accordance with the opinion of Abū Yūsuf and not with that of Muḥammad. Both these opinions have been pro-

nounced correct by the application of the word fatwá. If they are shares in moveables their waqf is valid provided that they are not capable of division and there has been recognized practice as to making waqf of them. For in the gloss of Ibn 'Ābidīn on the *Baḥr* we find the following: "And Muḥammad says—It is valid to make waqf of moveables when recognized in practice, etc." Now that you know that the waqf of moveables is valid according to the opinion of Muḥammad, you should have regard also to the conditions laid down by him concerning the waqf of these things, e.g. that they should be divided, not *mushā'*, when they are capable of division, and that they should be delivered to a Mutawallī, even though they do not satisfy the condition of perpetuity (*ta'bīd*)." Finis. Finally you should know that the language of jurists here show some leaning towards taking special recognized practice ('urf khāṣṣ) into consideration. This is one of the views of the school, and it is a proper view, since the language of the dedicators is based on their special practice (*'urf*) ..

Written on the 9th of Muḥarram, 1326 A.H. Fatwá No. 167.

OFFICIAL SEAL OF THE *Fatwá* DEPARTMENT.

SEAL OF THE GRAND MUFTI.

LXXXI. *Answer by Muḥammad Bakhīt al-Muṭī'ī, the Ḥanafī jurist of the University Mosque of al-Azhar, Muftī of Alexandria*:—

Praise be to God . . . I have perused the above-mentioned question. As these securities, company shares, pickaxes and shovels and similar things are all included under the term moveables, and as the rule applicable to the waqf of moveables is to the following effect:—"The waqf of moveables, if accessories to land, is valid without any difference of opinion between Abū Yūsuf and Muḥammad. If the waqf of such moveables be made independently and not as accessories to land, Abū Yūsuf rejects their waqf, but Muḥammad's opinion is in favour of the validity of waqf of such moveables as regards which there is Ta'āmul. This opinion has been adopted by the majority of jurists of various countries as stated in the *Hidāyah*, and this is the correct opinion as stated in the *Is'āf*, and it is the dictum of most doctors as stated in the *Ẓahiriyyah*. Moreover, it has been stated in the *Mujtabá* on the authority of the *Siyar*, that according to Muḥammad it is valid to make waqf of moveables unrestrictedly and according to Abū Yūsuf only when there is Ta'āmul"—therefore when a practice has arisen as to making waqf of these securities and shares, their waqf is valid, specially as they are of the nature of coins, dirhams and dinārs. Now we find in the *Manḥ*: As a practice has arisen in our days in Turkey and other countries of making waqf of

dirhams and dīnārs, they come under the dictum of Muḥammad in accordance with which is the fatwá as regards moveables in which there is Ta'āmul. So also it is valid to make waqf of pickaxes and shovels when there is a practice of doing so. Similarly [is valid the waqf of] all moveables including articles sold by measure and weight, things having price (qīmī) and similars (mithlī), cauldrons, bier and its pall, copies of the Qur'an and books. Since the Ta'āmul of the Muslims as regards these things is based on the rule of recognized practice ('urf) whereby analogy is disregarded on account of the saying of the Prophet, 'Whatever is good in the sight of the Muslims is good in the sight of God,' as reported by Aḥmad . . . That is why it is laid down in the *Mabsūt*,—'What is established by usage ('urf) is like what is established by express text.' And God knows best.

(Signed) Muḥammad Bakhīt al Muṭī'ī.

LXXXII. Fatwá of Shaykh 'Abd-Allah al-Māzandarānī the celebrated Mujtahid of Karbalā.

Question.—What does the great Ḥujjat-al-Islām and the refuge of mankind, may his shadow extend, say in connection with this religious point in law that, if several persons form into a joint stock company and purchase a property at a fixed price and divide it into a number of shares of equal value—for instance some purchase 10 shares and some 20 shares, and so on, each having a different number of shares—so that the annual profit may be divided proportionately amongst the share-holders according to the number of shares they hold—to explain this point more clearly, hundred men purchased a Bazar the total value of which is divided into 1,000 shares,—of 100 rupees each, so that each share-holder may receive the annual profit in proportion to the number of shares he holds; for instance Zayd has got 10 tickets, *i.e.*, 10 shares, whether Zayd can make a waqf of his own shares, so that the principal may remain as it is and the income may be spent for a specific purpose. Whether such a waqf, according to the Shī'ah Law, is valid or not? It is hoped that your Holiness may write your opinion on this point based upon the trustworthy writings of the learned predecessors and endorse it with your seal.

Answer.—In the name of God the Most High. The Shī'ahs in general and the majority of the Sunnīs belonging to the Four Schools and others (with the exception of a few ordinary men whose views on the subject are out of the way) hold that *mushā'* waqf is valid. Numerous authentic traditions from the Imāms, peace be on them, have been handed down, respecting *mushā'* charity (*ṣadaqah*) which clearly lay down that by *Ṣaḍaqa* is meant either waqf

itself or that waqf is the most obvious kind of it. Therefore the validity of such a waqf on account of its being owned by a joint stock company cannot be questioned. And as possession is the condition for validity of a waqf, therefore the donor must hand over (the property) either to him for whose benefit the waqf is made, or to the Mutawallī ; [he must give possession to the Mutawallī, etc.] exactly in the same way as he would have done to a purchaser to whom he had sold his share. In the case of waqf he must give possession to the Mutawallī. If he constitutes himself the Mutawallī, he must act according to the deed of waqf, and must consider his possession as that of a Mutawallī and not that of an owner. If he has made a waqf of *mushā'* property and given possession the waqf is valid and binding. If he has not given possession, he may revoke the waqf during his lifetime. If the dedicator dies before giving possession, the waqf is null and void. God is the All-knowing.

11th Sha'bān, 1325 A.H.

Seal of the Mujtahid.

"I certify the seal marked A on the margin of this paper to be that of Shaikh Abdullah Mazindarani, the celebrated Mujtahid of Najaf, who made the same in my presence this 28th day of September 1907."

(Sd.) M. H. M. . . .

British Vice-Consul.

Karbala, 28th September, 1907.

APPENDIX I.

BIBLIOGRAPHY SHOWING THE HISTORICAL DEVELOPMENT OF THE WAQF OF MOVEABLES.

The Koran.

I. *The Koran.*—The first and foremost fountain-head of Muslim Law, religious and secular, is silent on the point. The Koran contains no allusion to the institution of Waqf.

The Ḥadīth.

II. *'Umdat-al-Qārī.*—The celebrated commentary on the Ṣaḥīḥ of al-Bukhārī by the great doctor, al-'Aynī (see *infra* XVI and XXII). Al-Bukhārī is the highest recorder of the traditions. His collection of the sayings of the Prophet entitled the Ṣaḥīḥ is the most authentic and celebrated. It is second only to the Koran. (Encyc. Brit., 9th ed., vol. xvi, p. 594. Introd to Morley's Digest of Indian Cases, ccliii. Brocklemann, Gesch. der. Arab. Litt., ed. 1901, p. 130).

III. *Fatḥ-al-Bārī.*—Another celebrated commentary on the Ṣaḥīḥ of al-Bukhārī by Zayn al-dīn 'Abd al-Raḥmān b. Aḥmad, the Ḥanbalī, died 795 A. H.—(Haji Khalfa, vol vii, p. 997, ed. Leipzig).

Shī'ah Law.

IV. *Sharā'i' al-Islām.*—"It is the chief authority for Shī'ah Law in India."—Morley, cclxxvii.

V. *Masālik-al-Afhām.*—"A valuable and voluminous commentary on the *Sharā'i' al-Islām.*" (*Ibid.*).

Mālikī Law.

VI. *The Mukhtaṣar of Sīdī Khalīl.*—This celebrated compendium of Mālikī Law is the *Hidāyah* of the Mālikī School. "The *Mukhtaṣar* of Khalīl Ibn Isḥāq is a work professedly treating of the law according to the Mālikī doctrines"—Morley, p. cclxxiv to cclxxv.

VII. *The Mudawwanah.*—One of the great original sources of Mālikī Law. "He (Suḥnūn) held the post of Kadi at Cairawan, and on points of doctrine his opinions are of standard authority in the Maghrib. He is the author of the *Mudawwanah* (Digest) containing the doctrines of the Imām Mālik; this work . . . . . is the main authority relied on by the people of Cairawan. Died A.H. 240 (A.D. 845).—Ibn Khallikān's

Biographical Dictionary, vol. ii, p. 131 (Baron De Slane's Translation).

VIII. *Dardīr.*—A well-known commentary on the *Mukhtaṣar of Sīdī Khalīl.*

IX. *Dasūqī.* Another well-known commentary on the *Mukhtaṣar of Sīdī Khalīl.*

Shāfi'ī Law.

X. *The Ghāyat-al-Bayān* and *the Sharḥ Ghāyat-al-Bayān.*—See Supplement to the Catalogue of the Arabic MSS in the British Museum by Dr. Rieu, p. 203, No. 318, *Ghāyat al-Bayān* of al-Ramlī, "a commentary by Jamāl-uddīn upon a metrical treatise on Shafi'ī Law entitled *al-Zabad* by Aḥmad b. Raslan." See Brockelmann, p. 224.

Ḥanafī Law.

A. Early Authorities.

XI. *Qudūri*, also spelt "Kudury."—The earliest extant treatise on Ḥanafī Law, the celebrated Hidāyah being only one of its commentaries. See Morley, p. cclxv.

"Al-Kuduri died in A.H. 428 (A.D. 1036)." *Ibid.*, p. cclxv.

XII. *Qāḍī Khān* (also spelt as Cazi Khaun, Kazi Khan, &c.), author of *Fatāwá Qāḍī Khān* otherwise called *Fatāwá Khāniyyah* or simply *al-Khāniyyah*, d. 592 A.H. (1195 A.D.). Esteemed of equal authority with the *Hidāyah*. (Morley, cclxxxv; Harington's 'Analysis of the Bengal Regulations,' vol. i, p. 236). Higher than the *Hidāyah* according to—

(1) D'Ohsson's *Tableau Général de l'Empire Ottoman.*
(2) *Radd-al-Muḥtār*, vol. i, p. 79, Ed. Constantinople. *Ibid.*, vol. iv, p. 385.

Frequently quoted and referred to by the author of the *Hidāyah* himself. As Qāḍī Khān was himself a Judge (Qāḍī) as well as a jurist, his decisions are of great value (Ameer Ali, vol. i, p. xlviii).

B. The Hidāyah Group.

XIII. The *Hidāyah*, the well-known authority on Ḥanafī Law by Burhān al-dīn 'Alī, d. 593 A.H. (1196 A.D.). Morley, cclxvii. Translated into English by Hamilton from a loose Persian version of the original Arabic.

XIV. The *Kifāyah.*—It is a commentary on the *Hidāyah* by Imām al-dīn Amīr, etc. Morley, cclxix. The date of the work is 747 A.H. (1346 A.D.).

XV. The *'Ināyah*, commentary on the *Hidāyah* by Sheikh Akmal al-din Muhammad, d. 786 A.H. (1384 A.D.).

XVI. The *Bināyah* (otherwise known as al-'Aynī's commentary on the *Hidāyah*) is a commentary on the *Hidāyah* by Badr al-din b. Aḥmad al-'Aynī, d. 855 A.H. (1451 A.D.). Morley, cclxx, cclxxxvi.

XVII. *Fatḥ-al-Qadīr*, by Kamāl al-dīn Muḥammad al Siwāsī, commonly called Ibn Hammām (d. 861 A.H.=1456 A.D.), is the most comprehensive of all the comments on the *Hidāyah*. Morley, cclxix. Harington, p. 237

XVIII. *Sharḥ-al-Wiqāyah* is a commentary on the *Wiqāyah* (an introduction to the study of the *Hidāyah*) by Ubayd-Allah b Mas'ūd (d. 750 A.H.=1349 A.D.). Morley, cclxx; Harington, p. 240.

XIX. *Dhakhīrat-al-'Uqbá*, commonly known as the gloss of *Chalpī*, is the most celebrated super-commentary on the *Wiqāyah* by Yūsuf b. Junayd, commonly called *Chalpī*. Harington, p. 239.

XX. *Jāmi'-al-Rumūz*, otherwise known as *al-Quhistānī*. It is a most copious and esteemed commentary on the *Nikāyah*, which is an abridgement of the *Wiqāyah*. The date of the work is 941 A.H. (=1534 A.D.)

C. The Kanz Group.

XXI. *The Kanz-al-Daqā'iq*, by Ḥāfiẓ al-dīn al-Nasafī (710 A.H.), a book of great reputation, principally derived from the *Wafī*. Morley, cclxx.

XXII. *The Ramz-al-Ḥaqā'iq*, better known as al-'Aynī's commentary on the *Kanz-al-Daqā'iq* by Badr al-dīn b. Aḥmad al-'Aynī, d. 855 A.H.=1451 A.D. Morley, cclxx. There is also a gloss by al-'Aynī on the *Kanz-al-Daqā'iq*.

XXIII. *Mustakhlias-al-Ḥaqā'iq* is a commentary on the *Kanz-al-Daqā'iq* by Ibrāhīm b. Muḥammad 906 A.H.=1500 A.D. Haji Khalfa, vol. vii, p. 988, ed. Leipzig.

XXIV The *Kanz-al-Bayān*, a commentary on the *Kanz-al-Daqā'iq* by the great doctor, Shaykh Muṣṭafá al-Ṭā'ī.

XXV. *Mulla Miskīn* is a commentary on the *Kanz-al-Daqā'iq* by Mulla Miskīn.

This work was consulted by Ibn Nujaym, the author of the *Ashbāh wa'l Naẓā'ir*, who is also the author of the *Baḥr-al-Rā'iq*, in writing that work. See *Ashbāh*, p. 3, ed. Cal.

XXVI. *Fatḥ-al-Mu'in* is a commentary on the *Kanz-al-Daqā'iq* by the great doctor Mu'in al-dīn al-Haranī.

XXVII. *Baḥr-al-Rā'iq*, by Ibn al-Nujaym (d. 970 A.H.=1562 A.D.), is the most famous commentary on the *Kanz-al-Daqā'iq*. It may indeed almost be said to have superseded it in India. Morley, cclxx.

Received as an authority in every city of Islam. Equalled only by the *Fatḥ-al-Qadīr*, the famous commentary on the *Hidāyah*. Harington, p. 238.

D

XXVIII. The *Is'āf*.—The date of the work is 930 A.H.=1499 A.D. The author Burhān al-dīn Ibrāhīm died in 922 A.H.=1516 A.D. Haji Khalfa, vol. i, p. 284. The author was an eminent Hanafī jurist who flourished in Tripoli This

work exclusively deals with the law of Waqf and is based on that of al-Khaṣṣāf and al-Hilāl on the same subject. It is frequently quoted as an authority on the law of Waqf in the *Fatāwá 'Ālamgīrī*, the *Durr-al-Mukhtār*, the *Radd-al-Muḥtār* and other authoritative works on Muslim Law.

E.

XXIX. The *Fatāwá 'Ālamgīrī*, a collection of cases undertaken by order of the Moghal Emperor Aurangzīb, 1656 A.D. It is not an original work but a mere compilation by a number of Mawlawīs under the supervision of Aurangzīb.

F. Ottoman Group.

XXXI. The *Multaqá 'l-Abḥur*, by Ibrāhīm b. al-Ḥalabī (d. 956 A.H. = 1549 A.D.), one of the most important works on Ḥanafī Law.

XXXI. *Majma' al-Anhur*, by 'Abd al-Raḥmān, commonly known as Sheikh Zādé, is a commentary on the *Multaqá*. It was completed in 1077 A.H. = 1670 A.D. Morley, cclxxiii, Haji Khalfa, vol. vi, p. 105.

XXXII. The *Durr al-Muntaqá*, by 'Alā'al-dīn al-Hiskafī, d. 1071 A.H. = 1677 A.D.

XXXIII. The *Tanwīr al-Abṣār*, by Shams al-dīn al-Ghazzī. The date of the work is 995 A.H. = 1586 A.D., one of the most useful books according to Ḥanafī doctrine. Morley, cclxxxviii.

XXXIV. The *Durr al-Mukhtār*, written in A.H. 1071 = A.D. 1660, is one of the most noted commentaries on the *Tanwīr al-Abṣar* and is well known in India. "As high an authority as Qādī Khān." I. L. R. 8 All., 149, F. B. (1886). Morley, cclxxxviii.

XXXV. The *Radd-al-Muḥtār* is a commentary on the Durr-al-Mukhtār by Ibn 'Ābidīn of Syria, b. 1198, d. 1252 A.H. = 1835 A.D.

XXXVI. *Ṭaḥṭāwī*, one of the most celebrated commentaries on the *Durr-al-Mukhtār*.

XXXVII. *Fatāwá Tanqīḥ al-Ḥāmidiyyah*, a collection of Fatwás by Ibn 'Ābidīn, the author of the *Radd-al-Muḥtār*.

G. Miscellaneous Group.

XXXVIII. *Fatāwá Qunyah*. The *Qunyat al-Munyah* is a collection of decisions of considerable authority by al-Zāhidī, d. 658 A.H. = 1259 A.D. Morley, cclxxxvi.

XXXIX. *Fatāwá Bazzāziyyah*. Morley, ccxcii.

XL. *Fatāwá Mahdiyyah* (1090 A.H). By the Shaykh al-Islām and Grand Muftī of Egypt, Shaykh Muḥammad al-'Abbāsī (1301 A.H.), the celebrated Ḥanafī jurist of al-Azhar.

APPENDIX II.

TANQIḤ AL-ḤĀMIDIYYAH (Vol. I, p. 117, ed. Cairo).

Question.—A man makes a waqf of buffaloes in a place where their waqf is not recognized in practice, and with respect to which there has not been any Ta'āmul. Will it, or will it not, be deemed [sufficient to establish] Ta'āmul, if such a waqf is practised by one person or two persons? . . . .

Answer.—[After quoting the *Fatāwá 'Attābiyyah*, the *Khulāṣah*, &c., the author says:] (1) The necessary inference drawn from their (the jurists') expression "if the practice of making such waqfs prevailed," is that it (i.e. Ta'āmul) cannot be established by the practice of one person or of two persons, as that cannot be described as a prevalent practice. (2) According to Ibn Hammām, Ta'āmul means "the more frequent in use."

ARABIC TEXTS.

I. ردالمحتار الجزء الاول صفحة ٧٠

هذا مانقله العلامة بيري في أول شرحه على الاشباه عن شرح الهداية لابن الشحنة و نصه اذا صح الحديث وكان على خلاف المذهب عمل بالحديث و يكون ذلك مذهبه ولا يخرج مقلده عن كونه حنفيا بالعمل به فقد صح عنه انه قال اذا صح الحديث فهو مذهبي وقد حكى ذلك ابن عبد البر عن أبي حنيفة وغيره من الائمة اه و نقله أيضا الامام الشعراني عن الائمة الاربعة *

قوله من آثار الرحمة - صفحة ٧٠

فان اختلاف أئمة الهدى توسعة للناس كما في اول الثانار خانية و هذا يشير الى الحديث المشهور على ألسنة الناس و هو اختلاف امتي رحمة - قال رسول الله صلى الله عليه وسلم مهما اوتيتم من كتاب الله فالعمل به لا عذر لاحد في تركه فان لم يكن في كتاب الله فسنة مني ماضية فان لم تكن سنة مني فما قال اصحابي ان اصحابي بمنزلة النجوم في السماء فايما أخذتم به اهتديتم و اختلاف اصحابي لكم رحمة *

و نقل السيوطي عن عمر بن عبدالعزيز انه كان يقول ماسرني لو ان اصحاب محمد صلى الله عليه وسلم لم يختلفوا لانهم لو لم يختلفوا لم تكن رخصة *

II. الدر المختار الجزء اول صفحة ٧٠

و علم بأن الاختلاف من آثار الرحمة فمهما كان الاختلاف أكثر كانت الرحمة اوفر لما قالوا — رسم المفتي أن ما اتفق عليه أصحابنا في الروايات الظاهرة يفتي به قطعا و اختلف فيما اختلفوا فيه و الاصح كما في السراجية وغيرها انه يفتي بقول الامام على الاطلاق ثم بقول الثاني ثم بقول الثالث ثم بقول زفر و الحسن بن زياد و صحح في الحاوي القدسي قوة المدرك — مطلب اذا تعارض التصحيح — و في وقف البحر وغيره متى كان في المسئلة قولان مصححان جاز القضاء و الافتاء بأحدهما و في اول المضمرات اما العلامات للافتاء فقوله و عليه الفتوى و به يفتى و به نأخذ و عليه الاعتماد و عليه عمل اليوم و عليه عمل الامة و هو الصحيح او الاصح او الاظهر او الاشبه او الاوجه او المختار و نحوها

مما ذكر في حاشية البزدوى اه . و قال شيخنا الرملي في فتاويه و بعض الالفاظ آكد من بعض فلفظ الفتوى آكد من لفظ الصحيح و الاصح و الاشبه وغيرها و لفظ و به يفتى آكد من الفتوى عليه و الاصح آكد من الصحيح و الاحوط آكد من الاحتياط انتهى قلت لكن في شرح المنية للحلبي [عند قوله والاعجوز من مصحف الاغلاف] اذا تعارض امامان معتبران عبر احدهما بالصحيح والاخر بالاصح فالاخذ بالصحيح اولى لانهما اتفقا على انه صحيح و الاخذ بالمتفق اوفق [فليحفظ] ثم رأيت في رسالة آداب المفتي اذا ذيلت رواية في كتاب بمعتمد بالاصح او الاولى او الاوفق او نحوها فله ان يفتي بها و بمخالفها ايضا ايا شاء و اذا ذيلت بالصحيح او المأخوذ به او به يفتى او عليه الفتوى لم يفت بمخالفه الا اذا كان في الهداية مثلا هو الصحيح و في الكافي لمخالفه هو الصحيح فيخير فيختار الاقوى عنده و الاليق و الاصلح اه - فليحفظ و حاصل ما ذكره الشيخ قاسم في تصحيحه انه لا فرق بين المفتي و القاضي الا ان المفتي مخبر عن الحكم و القاضي ملزم به *

III. قوله في الروايات الظاهرة . صفحة ٧١

اعلم أن مسائل أصحابنا الحنفية على ثلاث طبقات أشرت اليها سابقا ملخصة [و نظمتها] - الاولى مسائل الاصول و تسمى ظاهر الرواية أيضا وهي مسائل مروية عن أصحاب المذهب وهم أبو حنيفة و ابو يوسف و محمد و يلحق بهم زفر و الحسن بن زياد وغيرهما ممن أخذ عن الامام لكن الغالب الشائع في ظاهر الرواية أن يكون قول الثلاثة و كتب ظاهر الرواية كتب محمد الستة المبسوط و الزيادات و الجامع الصغير و السير الصغير و الجامع الكبير و السير الكبير و انما سميت بظاهر الرواية لانها رويت عن محمد بروايات الثقات فهي ثابتة عنه اما متواترة أو مشهورة عنه - الثانية مسائل النوادر وهي المروية عن أصحابنا المذكورين لكن لا في الكتب المذكورة بل اما في كتب اخر لمحمد كالكيسانيات و الهارونيات و الجرجانيات و الرقيات [و انما قيل لها غير ظاهر الرواية لانها لم ترو عن محمد بروايات ظاهرة ثابتة صحيحة كالكتب الاولى] و اما في غير كتب محمد كالمجرد للحسن بن زياد وغيره فمنها كتب الامالي المروية عن أبي يوسف و اما برواية مفردة كرواية ابن سماعة [و المعلى بن منصور] وغيرهما في مسائل معينة - الثالثة الواقعات وهي مسائل استنبطها المجتهدون المتأخرون لما سئلوا عنها ولم يجدوا فيها رواية وهم أصحاب أبي يوسف و محمد و أصحاب

اصحابهما وهلم جرا وهم كثيرون فمن أصحابهما مثل عصام بن يوسف و ابن سلم [و محمد بن سماعة و أبي سليمان الجرجاني] و أبي حفص البخاري *

و قد يتفق لهم أن يخالفوا أصحاب المذهب لدلائل و اسباب ظهرت لهم و أول كتاب جمع في فتواهم فيما بلغنا كتاب النوازل للفقيه أبي الليث السمرقندي ثم جمع المشايخ بعده كتبا اخرى كمجموع النوازل و الواقعات للناطفي[و الواقعات للصدر الشهيد ثم ذكر المتأخرون هذه المسائل مختلطة غير مميزة كما في فتاوى قاضيخان و الخلاصة وغيرهما و ميز بعضهم كما في كتاب المحيط لرضي الدين السرخسي فانه ذكر أولا مسائل الاصول ثم النوادر ثم الفتوى و نعم ما فعل -] و اعلم أن من كتب مسائل الاصول كتاب الكافي للحاكم الشهيد وهو كتاب معتمد في نقل المذهب شرحه جماعة من المشايخ منهم الامام شمس الائمة السرخسي وهوالمشهور بمبسوط السرخسي قال العلامة الطرسوسي مبسوط السرخسي لا يعمل بما يخالفه ولا يركن الا اليه ولا يفتى ولا يعول الا عليه و من كتب المذهب ايضا المنتقى له ايضا الا أن فيه بعض النوادر و اعلم أن نسخ المبسوط المروي عن محمد متعددة و اظهرها مبسوط ابي سليمان الجوزجاني و شرح المبسوط جماعة من المتأخرين مثل شيخ الاسلام بكر المعروف بخواهر زاده و اسمى المبسوط الكبير و شمس الائمة الحلواني وغيرهما و مبسوطاتهم شروح في الحقيقة ذكروها مختلطة بمبسوط محمد كما فعل شراح الجامع الصغير مثل فخر الاسلام و قاضيخان و غيرهم فيقال ذكره قاضيخان في الجامع الصغير و المراد شرحه و كذا في غيره [و شرح الشيخ اسمعيل النابلسي على شرح الدرر]- فاحفظ ذلك فانه مهم كحفظ طبقات مشايخ المذهب و سنذكرها قريبا *

صفحة ٧٢

و في باب العيدين من النحر و النهر أن الجامع الصغير صنفه محمد بعد الاصل فما فيه هو المعول عليه ثم قال في النهر سمي الاصل أصلا لانه صنف أولا ثم الجامع الصغير ثم الكبير ثم الزيادات كذا في غاية البيان *

قوله بقول الامام - صفحة ٧٣

قال عبد الله بن مبارك لانه رأى الصحابة و زاحم التابعين في الفتوى فقوله اسد و اقوى عالم بكن اختلاف عصر و زمان *

قوله وصحح في الحاوي القدسي قوة المدرك - صفحة ٧٣

اقول يدل عليه قول السراجية و الاول أصح اذا لم يكن المفتي مجتهدا فهو صريح في أن المجتهد يعني من كان أهلا للنظر في الدليل يتبع من الاقوال ما كان أقوى دليلا و الا اتبع الترتيب السابق و من هذا تراهم قد يرجحون قول بعض أصحابه على قوله كما رجحوا قول زفر وحده في سبع عشرة مسئلة فتتبع ما رجحوه لانهم أهل النظر في الدليل ولم يذكروا اذا اختلفت الروايات عن الامام او لم يوجد عنه و لا عن اصحابه رواية أصلا ففي الاول يؤخذ باقواها حجة كما في الحاوي ثم قال و اذا لم يوجد في الحادثة عن واحد منهم جواب ظاهر وتكلم فيه المشايخ المتأخرون قولا واحدا يوخذ به فان اختلفوا يوخذ بقول الاكثرين *

و ان لم يوجد منهم جواب البتة نصا يدظر المفتي فيها نظر تأمل و تدبر و اجتهاد ليجد فيها ما يقرب الى الخروج عن العهدة *

قد جعل العلماء الفتوى على قول الامام الاعظم في العبادات مطلقا وقد صرحوا بأن الفتوى على قول محمد في جميع مسائل ذوى الارحام و في قضاء الاشباه و الظائر الفتوى على قول ابي يوسف فيما يتعلق بالقضاء كما في القنية و البزازية اه اى لحصول زيادة العلم له به بالتجربة و لذا رجع ابوحنيفة عن القول بان الصدقة افضل من حج التطوع لما حج و عرف مشقته وفي شرح البيري ان الفتوى على قول ابي يوسف ايضا في الشهادات و على قول زفر في سبع عشرة مسئلة حررتها في رسالة و ينبغي ان يكون هذا عند عدم ذكر اهل المتون للتصحيح و الا فالحكم بما في المتون كما لا يخفى لانها صارت متواترة *

و أذا كان في مسئلة قياس و استحسان فالعمل على الاستحسان الا في مسائل معدودة مشهورة *

صفحه ٧٤

اذا ذكر في المسئلة ثلاثة أقوال فالراجح هو الاول أو الاخير لا الوسط اه وفي شرح المنية و لا ينبغي أن يعدل عن الدراية اذا وافقتها رواية اه ذكره في واجبات الصلوة في معرض ترجيح رواية وجوب الرفع من الركوع والسجود للادلة الواردة مع أنها خلاف الرواية المشهورة عن الامام *

قوله و نحوها - صفحه ٧٥

كقولهم و به جرى العرف وهو المتعارف [و به اخذ علماؤنا] *

قوله وقال شيخنا

المراد به حيث أطلق في هذا الكتاب العلامة الشيخ خير الدين الوملي *

قوله و الاليق - صفحة ٧٦

أي لزمانه و الاصلح الذي يراه مناسبا في تلك الواقعة *

IV. صفحة ٧٧

[فقد ذكر في حيض البحر في بحث الوان الدماء أقوالا ضعيفة] قال وفي المعراج عن فخر الائمة لو افتى مفت بشيء من هذه الاقوال في مواضع الضرورة طلبا للتيسير كان حسنا *

V. صفحة ٧٩

لابد للمفتي أن يعلم حال من يفتي بقوله ولا يكفيه معرفته باسمه و نسبه بل لابد من معرفته في الرواية و درجته في الدراية و طبقته من طبقات الفقهاء ليكون على بصيرة في التمييز بين القائلين المتخالفين و قدرة كافية في الترجيح بين القولين المتعارضين - الاولى - طبقة المجتهدين في الشرع كالائمة الاربعة رضي الله عنهم و من سلك مسلكهم في تأسيس قواعد الاصول و به يمتازون عن غيرهم - الثانية - طبقة المجتهدين في المذهب كابي يوسف و محمد وسائر أصحاب ابي حنيفة القادرين على استخراج الاحكام من الادلة على مقتضى القواعد التي قررها استاذهم ابو حنيفة في الاحكام و ان خالفوه في بعض احكام الفروع لكن يقلدونه في قواعد الاصول و به يمتازون عن المعارضين في المذهب كالشافعي وغيره المخالفين له في الاحكام غير مقلدين له في الاصول - الثالثة - طبقة المجتهدين في المسائل التي لا نص فيها عن صاحب المذهب كالخصاف و ابي جعفر الطحاوي وابي الحسن الكرخي و شمس الائمة الحلواني و شمس الائمة السرخسي و فخر الاسلام البزدوي و فخر الدين قاضيخان و امثالهم فانهم لا يقدرون على شيء من المخالفة لا في الاصول ولا في الفروع لكنهم يستنبطون الاحكام في المسائل التي لا نص فيها على حسب الاصول و القواعد - الرابعة - أصحاب التخريج من المقلدين كالرازي وأضرابه فانهم لا يقدرون على الاجتهاد أصلا لكنهم لاحاطتهم بالاصول و ضبطهم للمآخذ يقدرون على تفصيل قول مجمل ذي وجهين و حكم مبهم محتمل لامرين منقول عن صاحب المذهب أو أحد

من اصحابه برأيهم و نظرهم في الاصول و المقيسة على امثاله و نظائره من الفروع وما في الهداية من قوله كذا في تخريج الكرخي و تخريج الرازي من هذا القبيل - الخامسة - طبقة اصحاب الترجيح من المقلدين كابي الحسن القدوري و صاحب الهداية و امثالهما وشأنهم تفضيل بعض اقوالهم هذا اولى وهذا اصح رواية وهذا ارفق للناس - والسادسة - طبقة المقلدين القادرين على التمييز بين الاقوى و القوي و الضعيف و ظاهر المذهب و الرواية النادرة كاصحاب المتون المعتبرة من المتاخرين مثل صاحب الكنز و صاحب المختار و صاحب الوقاية و صاحب المجمع و شأنهم ان لا ينقلوا الاقوال المردودة و الروايات الضعيفة و السابعة - طبقة المقلدين الذين لا يقدرون على ما ذكر *

VI. الدر المختار الجزء الاول صفحة ٧٩

أن المجتهد المطلق قد فقد و أما المقيد فعلى سبع مراتب مشهورة و أما بعض فعايدا اتباع ما رجحوه و ما صححوه كما لو افتوا في حيدتهم فان قلت قد يكون أقوالا بلا ترجيح و قد يختلفون في الصحيح قلت يعمل بمثل ما عملوا من اعتبار تغير العرف و أحوال الناس و ما هو الارفق و ما ظهر عليه التعامل و ما قوي وجهه *

VII.

(قوله بلا ترجيح) - [اى صريح او ضمني فالصريح ظاهر ما ذكره سابقا و الضمني ما نهنهك عليه عند قوله و في وقف البحر فانه اذا كان احد القولين ظاهر الرواية و الاخر غيرها فقد صرحوا اجمالا] بانه لا يعدل عنه بلا ترجيح صريح لمقابله و كذا لو كان احد القولين في المتون او الشروح او كان قول الامام او كان هو الاستحسان في غير ما استثني او كان انفع للوقف *

VIII.

(مذهب) حكم الحنفي بمذهب ابي يوسف او محمد حكم بمذهبه *

[قوله خلاف مذهبه] اى اصل المذهب كالحنفي اذا حكم على مذهب الشافعي او بعكسه او بالعكس و اما اذا حكم الحنفي بمذهب ابي يوسف او محمد

(٢) طبقة اصحاب الترجيح عد منهم الكنوي على الرازي تلميذ حسن بن زياد و ابن كمال باشا الرومي وابا السعود العمادي المفسر الرومي و عد منهم صاحب البحر الوائق ابن الهمام صاحب فتح القدير وقيل انه بلغ رتبة الاجتهاد * هكذا في عمدة الرعاية *

او نحوهما من اصحاب الامام فليس حكما بخلاف رأيه درر اي لان اصحاب الامام ما قالوا بقول الا قد قال به الامام *

مقدمة عمدة الرعاية حاشية شرح الوقاية صفحة ٤١ IX.

و المحال ان اماعذا الاعظم قال لا يحل لاحد ان ياخذ بقولنا مالم يعرف ماخذه من الكتاب و السنة او اجماع الامة او القياس الجلي في المسالة *

و قال الشافعي اذا صح الحديث على خلاف قولي فاضربوا قولي على الحائط و اعملوا بالحديث الضابط - صفحة ١٥ *

وفي كتاب القضاء من الاشباه المفتي انما يفتي بما يقع عنده من المصلحة كما في صغير البزازية انتهى *

وفي الاشباه ايضا يتعين الافتاء في الوقف بالانفع له كما في شرح المجمع و الحاوي القدسي *

صفحة ١٦

المراد بالامام و بالامام الاعظم في كتب اصحابنا هو صاحب المذهب ابو حنيفة وهو المراد بقولهم صاحب المذهب و المراد بالصاحبين ابو يوسف و محمد و بالشيخين ابو حنيفة و ابو يوسف و بالطرفين محمد و ابو حنيفة و بالامام الثاني ابو يوسف و بالامام الرباني محمد و بقولهم عند ائمتنا الثلثة ابو حنيفة و محمد و ابو يوسف و بالائمة الاربعة ابو حنيفة و مالك و الشافعي واحمد اصحاب المذاهب المشهورة . فائدة . شمس الائمة عند الاطلاق في كتب اصحابنا يراد به شمس الائمة السرخسي *

صفحة ١٧

ضمير عنده في قول الفقهاء هذا الحكم عنده او هذا مذهبه اذا لم يكن مرجعه مذكورا سابقا يرجع الى الامام ابي حنيفة و ان لم يسبق له ذكر لكونه مذكورا حكما وكذا ضمير عندهما يرجع الى ابي يوسف و محمد اذا لم يسبق مرجعه وقد يراد به ابو يوسف و ابو حنيفة او محمد و ابو حنيفة اذا سبق لذالثهما ذكر في مخالف ذلك الحكم [مثلا اذا قالوا عند محمد كذا و عندهما كذا يراد به ابو يوسف و ابو حنيفة يعني الشيخين و اذا قالوا عند ابي يوسف كذا و عندهما كذا يراد به ابو حنيفة و محمد يعني الطرفين]- فائدة - الفرق بين عنده و عنه

ان الاول دال على المذهب و الثاني على الرواية فاذا قالوا هذا عند ابي حنيفة دل ذلك على انه مذهبه و اذا قالوا عنه كذا دل ذلك على انه رواية عنه *

كثيرا ما يذكرون حكما مصدرا بلفظ قيل و يكتب الشراح و المحشون تحته انه اشارة الى ضعفه و الحق انه ان علم ان قائله الترم ان يذكر الحكم المرجوح بهذه الصيغة و يشير بها الى ضعفه قضى به جزما [كما علم من عادة مؤلف ملتقي الابحر فانه صرح في ديباجته عند ذكر التزاماته فيه ان كل ما صدرته بلفظ قيل و قالوا و ان كان مقبولا بالاصح و نحوه فانه مرجوح بالنسبة الى مالم يذكر ذلك انتهى -] و الا فلا يجزم بذلك *

الفتاوى الخيرية صفحة ٢١٤ X.

اجاب نعم يجوز فقد صرح علماؤنا المشاهير بجوازه ولو بالدراهم و الدنانير- و قالوا اذا تعينت المصلحة فيه جاز مخالفة الشرط لما بذا فيه .. و قد اتفق متاخروا علمائنا على الافتاء بما هو انفع للوقف في ما اختلفوا فيه *

نقاب الاسعاف في احكام الاوقاف - باب في الفاظ الوقف و أهله و محله و حكمه XI.

و محله - المال المتقوم بشرط كونه عقارا او منقولا او متعارفا وقفه *

كما لو وقف ضيعة و ذكر ما فيها من العبيد و الدواليب و الات الحراثة فانها تصير وقفها *

وفي فتاوى الناطفي عن محمد بن عبد الله الانصاري من اصحاب زفر رحمه الله انه يجوز وقف الدراهم و الطعام و المكيل و الموزون فقيل له و كيف يصنع بالدراهم قال يدفعها مضاربة و يتصدق بالفضل وكذا يباع المكيل و الموزون بالدراهم و الدنانير و يدفع مضاربة و يتصدق بالفضل *

فصل في وقف المنقول اصالة

و الصحيح ما روي عن محمد رحمه الله من انه يجوز وقف ما جري فيه التعارف كالمصاحف و الكتب و الفاس و القدوم و المنشار و القدر و الجنازة لوجود التعارف في وقف هذه الاشياء و به يترك القياس كما في الاستصناع [بخلاف مالا تعارف فيه كالثياب و الامتعة] لان من شرطه التأبيد كما بينا ولكن تركناه فيما ذكرنا للتعارف و في السلاح و الكراع للجهاد بالنص *

و لو وقف بقرة على رباط بان يعطي ما يخرج من لبنها و شيرازها و سمنها لابناء السبيل ان كان في موضع تعارفوا ذلك يصح كما في ماء السقاية و الا فلا [و لو وقف ثورا على اهل قرية ليذرى على بقرهم لا يصح لانه ليس فيه عرف ظاهر] *

و قد تقدم أن محمد بن عبد الله الانصاري من اصحاب زفر رحمه الله تعالى قال بجواز وقف الدراهم و الطعام *

فصل في وقف المشاع و قسمته و المهايأة فيه

اتفق أبو يوسف و محمد رحمهما الله على جواز وقف مشاع لا يمكن قسمته كالحمام و البئر و الرحى و اختلفا فى الممكن فأجازه أبو يوسف و به أخذ مشايخ بلخ و أبطله محمد رح *

و لو قضى بجواز الوقف المشاع ارتفع الخلاف *

الجزء الثالث من فتاوى قاضيخان صفحه ٣٠٦ المطبوع بمصر

XII. سنة ١٢٨٢ هجرية

١ — قال الشيخ الامام الاجل شمس الائمة السرخسي رحمه الله تعالى اي وقف المنقول مقصودا خلاف بين ابي يوسف و محمد رحمهما الله تعالى ذكره فى السير الكبير قال و الصحيح من الجواب ان ما فيه عرف ظاهر بين الناس لوقفه كالجنازة و ثيابها و ما يحتاج اليه من القدور و الاواني لغسل الميت و المصاحف و الكراع و السلاح والفرس للجهاد يجوز وقفه *

٢ — و اختلف المشائخ رحمهم الله تعالى في وقف الكتب جوزه الفقيه ابو الليث رحمه الله تعالى و عليه الفتوى - و نصير رحمه الله وقف كتبه *

٣ — رجل وقف بقرة على رباط على ان ما يخرج من لبنها و سمنها و شيرازها يعطي لابناء السبيل ان كان ذلك في موضع تعارفوا ذلك جاز كما يجوز ماء السقاية *

٤ — رجل وقف دابة على رباط ... *

٥ — رجل وقف ثورا على اهل قرية لانزاء بقرهم لا يصح لانه ليس بقربة مقصودة و ليس فيه عرف ظاهر *

٦ — رجل وضع حبا ... *

٧ — رجل وقف بناء بدون ارض قال هلال رحمه الله تعالى لا يجوز ذلك *

٨ — و عن زفر رحمه الله تعالى رجل وقف الدراهم او الطعام او ما يكال او يوزن قال يجوز قيل له و كيف يكون قال و يدفع الدراهم مضاربة ثم يتصدق بفضلها في الوجه الذي وقف عليه وما يكال و يوزن يباع فيدفع ثمنه بضاعة او مضاربة كالدراهم - قالوا على هذا القياس لو قال هذا الكر من الحنطة وقف على شرط ان يقرض من الفقراء الذين لا بذر لهم فيزرعوها لانفسهم ثم يرد منهم بعد الادراك قدر القرض ثم يقرض لغيرهم من الفقراء على هذا ابدا جاز على هذا الوجه *

٩ — مريض اوصى ان يدفع الى فلان الف درهم ... *

١٠ — و عن ابي يوسف رحمه الله تعالى [في النوادر] لا يجوز الوقف في الحيوان *

١١ — رجل وقف بستانا بما فيه من البقر و الغنم و الرقيق فانه يجوز *

١٢ — رجل وقف موضعا في صحته و اخرجه عن يده فاستولى عليه غاصب وحال بين الوقف و بينه قال الشيخ الامام ابوبكر محمد بن الفضل رحمه الله تعالى ياخذ من الغاصب قيمتها و يشتري بها موضعا آخر فيقفه على شرائط الاول [قيل له اليس بيع الوقف لا يجوز فقال اذا كان الغاصب جاحدا و ليس للوقف بينة يصير مستهلكا] و الشيء المسبل اذا صار مستهلكا يجب به الاستبدال كالفرس المسبل اذا قتل و العبد الموصى بخدمة الكعبة اذا قتل *

١٣ — متولي الوقف اذا صرف دراهم الوقف في حاجة نفسه ... *

١٤ — للقيم ان يبيع الدواب التي كبر سنها و خرجت من ان تكون صالحة لما ربطت *

١٥ — اهل مسجد ... *

١٦ — متولي المسجد اذا اشترى غلة المسجد دارا .. *

١٧ — [مسجد له غلة ذكر الواقف في وقفه] ان القيم يشترى بتلك الغلة جائزة [لا يجوز للقيم ان يشتري] .. *

١٨ — قرية فيها بئر [صاروية بالاجر] خربت القرية ... *

١٩ — رجل وقف بناء ارض له ... *

٢٠ — و عن زفر رحمه الله تعالى اذا وقف الدراهم و الطعام وما يكال او يوزن يجوز *

٢١ — اذا وقف جنازة او نعشا *

القهستاني صفحة ٥٢٣ الجزء الثالث XIII.

و صح عند محمد رح وقف منقول فيه تعامل اى تعارف - كالمصحف * و نحوه - كالكتاب و الفاس و المنشار و الطشت و الجنازة و ثيابها و السلاح و البغل و الحمار و العبيد و الثيران و آلات الزراعة والشجر و الشرب مع الارض و الحمام مع البرج و النخل مع الكوارة *

فلو لم يتعامل [كالثياب و الحيوان] لم يجز الا بالتبعية كما فى المغني وغيره *

وذكر فى الزاهدي ان وقف المنقول جائز عند محمد رح وان لم يتعامل فيه . و بطل عند ابي يوسف رح ان لم يتعامل *

و عليه الفتوى - اى يفتى بما صح عند محمد رح لحاجة الناس اليه *

الدرالمنتقى في شرح الملتقى الجزء الاول صفحة ٧٤٦ XIV.

وكذا المنقول المتعارف وقفه عند محمد رح - وكذا غير المتعارف ايضا عند محمد رح وبطل عند ابي يوسف رح ان لم يتعارف كما في شرح الوهبانية عن الزاهدي عن السير الكبير - و تبعه الشرنبلالي و اقره - و نقله القهستاني و اقره . فليحفظ *

لكن فى البرجندي وغيره ان غير المتعارف لم يجز عند الثلاثة عندنا *

و عند الشافعي رح كل ما يمكن ان ينتفع به مع بقاء اصله و يجوز بيعه يجوز وقفه بمنزلة العقار *

كالفاس والمر - و جميع آلات الزراعة و الشرب *

و القدوم و المنشار و الجرار و ثيابها وكذا وقف الاكسية على الفقراء *

قلت وفي زماننا - وقد وقف بعض المتولين على المؤذنين الفراء شتاء ليلا فينبغي الجواز سيما على ما مر عن الزاهدي *

قدور الخ — وقد زاد مشائخنا اشياء من المنقول على ما قاله محمد و ابو يوسف رحمهما الله تعالى عملا بالتعامل كما في المنح *

و قلت و عليه مع ما مر عن الزاهدي فلا يحتاج لرواية الانصاري عن زفر رح بوقف الدراهم والدنانير كما ظن *

وقد ورد امر شريف للقضاة بالحكم به كما في معروضات المفتي ابي السعود *

وكذا وقف المكيل و الموزون فيباع و يدفع ثمنه مضاربة او بضاعة كالدراهم - و قاسوا عليه وقف كر بر على شرط ان يقرضه لمن لا بذر له ليزرعه لنفسه *

قال ولو وقف بقرة على ان ما خرج من لبنها و سمنها للفقراء ان اعتادوا ذلك رجوت انه يجوز - و الحق في المنح وقف البناء بدون الارض وكذا وقف الاشجار بدونها لانه منقول فيه تعامل *

و به - اى بقول محمد رح - يفتى - لوجود التعامل - و به يترك القياس كما في الاستصناع - قال عليه الصلوة و السلام ما رآه المسلمون حسنا فهو عندالله حسن *

مجمع الانهر في شرح الملتقى الجزء الاول صفحة ٧٤٦ XV.

وصح وقف العقار - وكذا - صح وقف المنقول المتعارف وقفه عند محمد رح كما صح وقف المنقول مقصودا اذا تعامل الناس وقفه - كالفاس و المر و القدوم و المنشار و الجدارة - و ثيابها *

و القدور و المراجل و المصاحف و الكتب *

و به - اى و بقول محمد رح - يفتى - لوجود التعامل في هذه الاشياء *

و اختاره اكثر فقهاء الامصار وهو الصحيح كما في الاسعاف وهو قول عامة المشائخ كما في الظهيرة - لان القياس قد يترك بالتعامل كما في الاستصناع [بخلاف ما لا تعامل فيه كالثياب و الامتعة خلافا للشافعي رح] - وقد حكى المجتبى الخلاف على خلاف هذا المنقول فقيل قول محمد رح بجوازه مطلقا جرى التعارف به او لا و قول ابي يوسف رح ان جرى فيه تعامل *

ولما جرى التعامل في وقف الدنانير و الدراهم في زمان زفر رح بعد تجويز صحة وقفهما في رواية دخلت تحت قول محمد رح المفتى به في وقف كل منقول فيه تعامل كما لا يخفى فلا يحتاج على هذا الى تخصيص القول بجواز

وقفهما لمذهب زفر من رواية الانصاري - و قد افتى صاحب البحر بجواز وقفهما ولم يحك خلافا كما في المنح *

و المعمول به الآن الجواز - وكذا حكم وقف الاشجار - و في المنح المتعارف في ديارنا وقف البناء بدون الارض وكذا وقف الاشجار بدونها فيتعين الافتاء بصحته لانه منقول فيه التعامل انتهى *

و المراد بالتعامل تعامل الصحابة و التابعين و المجتهدين من ائمة الدين رضوان الله تعالى عليهم و علينا اجمعين * لا تعارف العوام كما قال بعض الفضلاء- افعلى هذا ما قال صاحب المنح من ان المتعارف الى قوله لانه منقول فيه تعامل ليس بمعتمد - لكن في المحيط وغيره رجل وقف بقرة على رباط على ان ما يخرج من لبنها و سمنها يعطى لابناء السبيل فان كان في موضع يغلب ذلك في اوقاته رجوت ان يكون جائزا *

و من المشائخ من قال بالجواز مطلقا - قالوا لانه جرى بذلك التعارف في ديار المسلمين انتهى - هذا يشعر بان المراد بمطلق التعارف لا ما قاله البعض - تدبر *

XVI. ملا مسكين مع فتح المعين الجزء ٣ صفحه ٥٠٧

(الف) و - صح وقف - منقول فيه تعامل - يعني جرت العادة بوقفه مطلقا سواء كان مصحفا او قاسا او مرا او منشارا او جنازة او ثيابها او قدورا او مراجل او كراعا او سلاحا عند محمد رح *

٥٠٨ - و عليه عامة المشائخ استحسانا *

(ب) قوله فيه تعامل - كفاس و قدوم و دراهم و دنانيركذا في التنوير - و هذا قول محمد رح و عليه الفتوى - در عن الاختيار - فاستفيد ان وقف الدراهم و الدنانير من قبيل وقف المتعامل - وهكذا يستفاد من عبارة الزيلعي والعيني *

و على هذا فالتعامل في جميع البلدان ليس بشرط - و منه يعلم سقوط ما ذكره في النهر بحثا حيث قال و مقتضى ما مر عن محمد رح عدم جواز ذلك في الاقطار المصرية لعدم تعارفه بالكلية - نعم وقف الدراهم و الدنانير تعورف في الديار الرومية انتهى *

على انه في شرح ملتقى الابحر للعلائي ذكر بعد قول المتن *

وكذا المنقول المتعارف وقفه عند محمد رح فقال وكذا غير المتعارف ايضا عند محمد رح كما في شرح الوهبانية عن الزاهدي عن السير الكبير و تبعه الشرنبلالي و اقره القهستاني *

ثم قال وعلى ما ذكر عن الزاهدي لا يحتاج لرواية الانصاري عن زفر رح *

وقد ورد امر شريف للقضاة بالحكم به كما في معروضات المفتي ابي السعود [illegible] هذا مع ان ما افتى به بعضهم من ان القول بجواز وقف الدراهم ضعيف لكونه محكيا عن زفر رح غير صواب *

قوله يعني جرت العادة بوقفه - لقوله عليه الصلوة و السلام ما رآه المسلمون حسنا فهو عند الله حسن - و لان المتعارف اقوى من القياس فيترك به القياس كالاستصناع *

البحر الرائق الجزء ٥ صفحة ٢٠٢ XVII.

و محله - المال المدقوم *

متن البحر الجزء صفحة ٥ ٢١٦

وصح وقف العقار ببقره و اكرته و مشاع قضي بجواره و منقول فيه تعامل *

و قال محمد رح يجوز وقف ما فيه تعامل من المنقولات - و اختاره اكثر فقهاء الامصار [وهو الصحيح كما في الاسعاف و هو قول عامة المشائخ كما في الظهيرية]- لان القياس قد يترك بالتعامل كما في الاستصناع *

وقد حكى في المجتبى هذا الخلاف في المنقول على خلاف هذا وعزاه الى السير - فنقل قول محمد رح بجوازه مطلقا جرى التعارف به او لا - وقول ابي يوسف رح بجوازه ان جرى فيه تعامل - و مثل في الهداية ما فيه تعامل كالقاس و المرو و المنشار و الجنازة و دفنها و القدور و المراجل و المصاحف - قال و عن نصير بن يحيى انه وقف كتبه الحقا لها بالمصاحف و هذا صحيح *

وذكر في التحرير في بحث الحقيقة ان التعامل هو الاكثر استعمالا فلذا اقتصر الامام محمد رح على هذه الاشياء فخرج ما لا تعامل فيه كالثياب والحيوان و الذهب والفضة و لو حليا لان الوقف فيه لا يتابد و لابد منه بخلاف الكراع و السلاح لورود النص بهما و ما ذكرناه للتعامل - فبقي ما عدا ذلك على اصل القياس *

و قد زاد بعض المشائخ اشياء من المنقول على ما قاله محمد رح لما رأوا من جريان التعامل بها - ففي الخلاصة وقف نقرة على رجوت ان يكون ذلك جائزا *

وعن الاعشاري وكان من اصحاب زفر رح في من وقف الدراهم او الدنانير او الطعام او ما يكال او يوزن انجوز قال نعم *

و الاكسية و استرة الموتى اذا وقف صدقة ابدا جاز و تدفع الاكسية للفقراء فينتفعون بها في اوقات لبسها *

ولو وقف دورا لانزاء بعرهم لا يصح *

[وفي الخلاصة ايضا] يجوز وقف الغلمان و الجواري على مصالح الرباط كذا في فتح القدير ولم يذكر وقف السفينة ولم ار من صرح بها - و لا شك في دخولها تحت المنقول الذي لا تعامل فيه فلا يجوز وقفها *

[وقد وقف بعضهم سفينة على مقام الشافعي رح فسألني عنه فاجبت بعدم الصحة بناء على هذا *]

وقف بستانا لما فيه من البقر و الغنم و الرقيق يجوز *

وقف الادوية والتيمارخانة لا يجوز اذا لم يذكر الفقراء - بقي مسئلتان - الاولى وقف البناء بدون الارض *

في الذخيرة وقف البناء من غير وقف الاصل لم يجز وهو الصحيح لانه منقول وقفه غير متعارف *

الثانية وقف الشجر *

XVIII. الهداية المطبوعة بمصر مع فتح القدير - الجزء ٥ صفحة ٤٢٩

وقال محمد رح يجوز حبس الكراع و السلاح و معناه وقفه في سبيل الله و ابو يوسف رح معه فيه [على ما قالوا] وهو استحسان *

و القياس ان لا يجوز لما بيناه من قبل - وجه الاستحسان الآثار المشهورة فيه - منها قوله عليه الصلوة و السلام و اما خالد فقد حبس ادرعا و افراسا له في سبيل الله تعالى و علقة حبس دروعه في سبيل الله تعالى *

و الكراع الخيل و يدخل في حكمه الابل لان العرب يجاهدون عليها - وكذا السلاح يحمل عليها *

و عن محمد رح انه يجوز وقف ما فيه تعامل من المنقولات كالفاس والمر و القدوم و المنشار و الجنازة و ثيابها و القدور و المراجل و المصاحف [و عند ابي يوسف رح لا يجوز لان القياس انما يترك بالنص و النص ورد في الكراع و السلاح فيقتصر عليه] *

و محمد رح يقول القياس قد يترك بالتعامل كما في الاستصناع وقد وجد التعامل في هذه الاشياء *

و عن نصير بن يحيى انه وقف كتبه الحقها بالمصاحف و هذا صحيح *

واكثر فقهاء الامصار على قول محمد رح وما لا تعامل فيه لا يجوز عندنا وقفه *

و قال الشافعي رح كل ما يمكن الانتفاع به مع بقاء اصله و يجوز بيعه يجوز وقفه لانه يمكن الانتفاع به فاشبه العقار و الكراع و السلاح *

ولنا ان الوقف فيه لا يتأبد ولابد منه على ما بيناه فصار كالدراهم و الدنانير بخلاف العقار و لا معارض من حيث السمع و لا من حيث التعامل فبقي على اصل القياس و هذا لان العقار يتأبد و الجهاد سنام الدين فكان معنى القربة فيهما اقوى فلا يكون غيرهما في معناهما *

فتح القدير المطبوع بمصر - الجزء ٥ صفحة ٤٢٩ .XIX

ثم قال القدوري - و قال ابو يوسف رحمه الله تعالى اذا وقف ضيعة ببقرها و اكرتها و هم عبيده جاز - ولو مرض بعضهم فتعطل عن العمل فللقيم ان يبيع من عجز و يشتري بثمنه آخر يعمل كما لو قتل فالحق به عليه ان يشتري بها آخر *

[قال المصنف رح - و قال محمد رحمه الله تعالى يجوز حبس الكراع - وهي الخيل و السلاح - وصار وقفه في سبيل الله تعالى و ابو يوسف رح معه - ايضا في ذلك - على ما قالوا و هذا استحسان *]

وجه الاستحسان الآثار المشهورة فيه - اي في الكراع و السلاح - منها قوله صلى الله عليه وسلم في الصحيحين عن ابي هريرة واما خالد فانكم تظلمون خالدا وقد احتبس ادراعه و اعتده في سبيل الله و اما ما ذكر المصنف من ان لمحمد حبس دروعه و في رواية ادراعه و اعتده فلم يعرف *

[و الحاصل ان وقف المنقول تبعا للعقار يجوز - واما وقفه مقصودا ان كان كراعا او سلاحا جاز و فيما سوى ذلك ان كان مما لم يجر التعامل بوقفه كالثياب و الحيوان و نحوه و الذهب و الفضة لا يجوز عندنا - و ان كان متعارفا كالجدازة و القاس و القدوم و نياب الجنازة و مما يحتاج اليه من الاواني و القدور في غسل الموتى و المصاحف قال ابو يوسف رح لا يجوز - و قال محمد رح يجوز - و اليه ذهب عامة المشائخ - منهم الامام السرخسي كذا في الخلاصة *]

وعلى قول محمد رح اكثر فقهاء الامصار وما لا تعامل فيه لا يجوز وقفه عندنا

وقال الشافعي رح كل ما امكن الانتفاع به مع بقاء اصله و يجوز بيعه يجوز وقفه - وهذا قول مالك و احمد رح ايضا - و اما وقف مالا ينتفع به الا بالاتلاف كالذهب و الفضة و المأكول و المشروب فغير جائز في قول عامة الفقهاء *

و المراد بالذهب و الفضة الدراهم و الدنانير وما ليس بحلي و اما الحلي فيصح وقفه عند احمد رح و الشافعي رح لان حفصة رضى الله عنها ابتاعت حليا بعشرين الفا فحبسته على نساء آل الخطاب فكانت لا تخرج زكاته وعن احمد رح لا يصح وقفه و انكر الحديث ذكره ابن قدامة في المغني *

و حاصل وجه الجماعة القياس على الكراع و عارضه المصنف بان حكم الوقف الشرعي التابيد ولا يتأبد غير العقار غير انه ترك في الجهاد *

و اذا عرفت هذا فقد زاد بعض المشائخ اشياء من المنقول على ما ذكره محمد لما رأوا من جريان التعامل فيها *

وقف بقرة على ان ما يخرج من لبنها و سمنها يعطى لابناء السبيل يكون جائزا - وعن الانصاري وكان من اصحاب زفر فيمن وقف الدراهم او الطعام او ما يكال او ما يوزن ايجوز دلك - قال نعم *

و الاكسية و اسرة الموتى اذا وقف صدقة ابدا جاز [وتدفع الاكسية للفقراء ينتفعون بها في اوقات لبسها] *

يجوز وقف الغلمان و الجواري على مصالح الرباط *

الكفاية على الهداية المطبوعة بمصر - صفحه ٢٩ الجزء خامس .XX

قوله مع بقاء اصله - احترز عن الدراهم و الدنانير فان الانتفاع الذي خلقت الدراهم و الدنانير لاجله وهو الثمنية لا يتمكن بهما مع بقاء اصله في ملكه *

قوله و يجوز بيعه احتراز عن ام الولد فانه لا يجوز وقفها *

قوله ولا معارض من حيث السمع *

و القياس فى المنقول ان لا يصح وقفه لان الوقف فيه لايتابد و لابد من التابيد الا ان السمع عارض القياس فى البعض كما فى الكراع و السلاح حيث وردت الآثار المشهورة وفى البعض عارض القياس المعامل كما فى الفاس و المر و القدوم و القدور و المراجل فبقى الباقى كالثياب و البسط و كالعبيد و الاماء فصدا على القياس اذ لا معارض فيها من حيث السمع و المعامل *

XXI. العناية على الهداية صفحة ٢٠٣ الجزء خامس

ولما ان الوقف فى المنقول لا يتأبد وهو ظاهر وما لا يتأبد لايجوز وقفه لان التابيد لابد منه على ما مبناه فصارت المنقولات كالدراهم و الدنانير و قوله - بخلاف العقار - جواب عن اعتباره بالعقار *

و قوله - ولا معارض من حيث السمع - جواب عن قوله فاشبه الكراع و السلاح ووجهه ان الاصل لا يجوز وقف الكراع و السلاح ايضا كالدراهم الا انا تركناه بمعارض راجح من حيث السمع *

و قوله - ولا من حيث المعامل - جواب عما يقال ترك الاصل فى الكراع و السلاح بمعارض من حيث السمع وهو ليس بموجود فى المراجل و القدوم و غيرهما فلتكن صورة النزاع مقيسة على ذلك *

و وجهه ان لهما معارضا من حيث التعامل و ليس بموجود فى صورة النزاع كالعبيد و الاماء و الثياب و البسط و امثالها فبقى على اصل القياس *

[و قوله - وهذا - استظهار على ان الحاق غير العقار و الكراع و السلاح بهما غير جائز لان عدمهما لقوتهما ليس في معناهما] ولم يذكر المعامل اعتمادا على شهرة كون المعامل اقوى من القياس فجاز ان يترك به *

XXII. حاشية سعدي چلبي على العناية صفحة ٢٠٣ الجزء الخامس

قوله يعنى ماصر ان من شرطه التابيد و التأبيد لا يتحقق فى المنقول اقول وفيه تأمل كتب و جهه فى الجواب عن دليل الشافعى رح على ما يجئ *

قال المصنف رح - ولابد منه على ما مبناه - اقول اللازم من الدليل هو تابد الوقف مدة بقاء الموقوف و ذلك موجود في محل النزاع ايضا فليتأمل *

XXIII. العيني على الهداية صفحه ٩٩٣ الجزء الثاني

[ش — اى عند محمد رح فيما تعارف الناس وقفه كالمنشار و الفاس و الجنازة و المصحف لقراءة القرآن و القدور و المراجل و ما لم يتعارف الناس وقفه لا يجوز وقفه كوقف الثياب وغيرها من الامتعة *]

وقال الشافعي و مالك و احمد رحمهم الله تعالى يجوز وقف كل ما ينتفع به مع بقاء عينه وعن مالك رح فى الكراع و السلاح روايتان و اما وقف مالا ينتفع به الا بالاتلاف كالذهب و الفضة و المأكول و المشروب فقيل غير جائز في قول عامة الفقهاء و اهل العلم الا ما حكي عن مالك و الاوزاعى ان وقف الطعام يجوز ولم يحكه اصحاب مالك رح وليس بصحيح *

م — واما خالد رضى الله عنه فقد حبس ادرعا و افراسا له في سبيل الله تعالى *

ش — هذا الحديث رواه البخارى ومسلم [عن ابى الزناد عن الاعرج] عن ابى هريرة *

م — وقال الشافعي رح كل ما يمكن الانتفاع به مع بقاء اصله +

ش — احترز به عن الدراهم و الدنانير فان الانتفاع الذي خلقت الدراهم والدنانير لاجله وهو الثمنية [لا يمكن فيهما مع بقاء اصله في ملك] *

م — يجوز وقفه *

م — لانه يمكن الانتفاع به فاشبه العقار و الكراع و السلاح *

[ش — و وجهه ان الاصل لا يجوز وقف الكراع والسلاح اى فاشبه ما ينتفع به مع بقاء اصله العقار في صحة وقفه *]

م — ولذا ان الوقف فيه *

ش — اى فى المنقول الذى ذكره *

م — لا يتأبد ولابد منه *

ش — اى و الحال لابد من التأبيد وما لا يتأبد لا يجوز وقفه *

م — على ما بيناه *

ش — فيما قبل من اشتراط التأبيد *

م — فصار ،

ش — اي كل ما ينتفع به مع بقاء اصله *

م — كالدراهم و الدنانير *

ش — في عدم الجواز *

م — بخلاف العقار *

ش — فان فيه التأبيد وان لم يذكر ولم يشترط *

م — ولا معارض من حيث السمع *

ش — جواب عن قوله فاشبه العقار و الكراع و السلاح ايضا *

م — ولا من حيث التعامل *

ش — جواب عما يقال ترك الاصل في الكراع و السلاح لمعارض من حيث السمع وهو ليس بموجود في المر و القدوم و غيرهما فليكن صورة النزاع مقيسة على ذلك *

و وجهه ان لهما معارضا من حيث التعامل وليس بموجود في صورة النزاع كالعبيد و الاماء و الثياب و البسط و امثالها *

قال صاحب المحيط وقف مائة و خمسين دينارا على مرضي بطريق الوصية يصح و يدفع الدهب الى انسان بمضاربة يستعملها و يصرف الربح و في المحيط كذلك وقف الدراهم و المكيل و الموزون *

XXIV. مستخلص الحقائق صفحه ٢٠٤

منقول فيه تعامل للناس كفأس و قدوم و دراهم و دنانير و قدر و جنازة و ثيابها و مصحف و كتب بخلاف مالا تعامل فيه *

XXV. كنز البيان الجزء الاول صفحة ١١٦

و يجوز وقف منقول قصدا مما فيه تعامل الناس كفاس و قدوم و دراهم و دنانير و قدر و جنازة و ثيابها و مصحف و كتب بخلاف مالا تعامل فيه كثياب و متاع على قول محمد و عليه الفتوى *

XXVI. العيني على الكنز كتاب الوقف صفحه ٤٦١

[وصح ايضا وقف مشاع قضى بجوازه اى بجواز الوقف فيه لان قضاء القاضي يقطع الخلاف فى المجتهدات و ان لم يقض فيه فعلى قول ابي يوسف رح يجوز خلافا لمحمد رح *] .

وصح ايضا وقف منقول كالكراع و السلاح و الفاس و القدر و القدوم و المنشار و الجنازة و ثيابها و المصاحف و كتب الفقه و الحديث و الادبية وغير ذلك مما فيه تعامل او تعارف بوقفه وهو قول محمد رح و عليه الفتوى لورود الآثار بذلك *

و الشافعي رح جوز وقف كل ما يجوز بيعه و يمكن الانتفاع به مع بقاء عينه قياسا على الكراع و السلاح *

قلنا الاصل عدم جواز الوقف فيقتصر على مورد الشرع وهو العقار و الكراع فيبقى ماوراءه على اصل القياس الا ماجرى التعامل فيه كصار كالدراهم والدنانير *

XXVII. العيني على الكنز صفحه ٤٦٢

[فيه تعامل اى صح الوقف في منقول تعورف بين الناس الوقف فيه كما في هذه الاشياء يؤيد هذا الاستخراج قول صاحب البيان في شرح قول صاحب الهداية وقد وجد التعامل في هذه الاشياء اى في وقف هذه الاشياء *]

قوله فيه تعامل [فقوله و منقول بالجر عطف على مشاع] اى وصح وقف المنقول الذي فيه تعامل الناس اى قد جرت العادة في وقفه وهذا على قول محمد رح و عليه الفتوى و قيل ان ابا يوسف رح معه [ثم هذا استحسان *]

XXVIII. الجزء الثالث من تنوير الابصار

ولو وقف العقار ببقره و اكرته كما صح وقف قضى بجوازه و منقول فيه تعامل كفاس و قدوم و دراهم و دنانير *

XXIX. الجزء الثالث من الدر المختار

و جاز وقف القن على مصالح الرباط خلاصة - ولو قتل عمدا لا قود فيه بزازية - بل تجب قيمته ليشترى بها بدله كما صح وقف مشاع - لانه مجتهد فيه فللحنفي المقلد ان يحكم بصحة وقف المشاع و بطلانه لا ختلاف الترجيح

و اذا كان في المسئلة قولان مصححان جاز الافتاء و القضاء باحدهما بحر و مصنف *

و كما صح ايضا وقف كل منقول قصدا فيه تعامل كفاس و قدوم بل و دراهم و دنانير قلت بل ورد الامر للقضاة بالحكم به كما في معروضات المفتي ابي السعود [و مكيل و موزون] و فيها [اي الخلاصة] وقف بقرة على ان ما خرج من لبنها او سمنها للفقراء ان اعتادوا ذلك رجوت ان يجوز وقدر وجازة و ثيابها و مصحف و كتب لان التعامل يترك به القياس لحديث ماراٰه المسلمون حسنا فهو عند الله حسن بخلاف ما لا تعامل فيه كثياب و متاع و هذا قول محمد رح [و عليه الفتوى اختيار] و الحق في البحر السفينة و المتاع و في البزازية جاز وقف الاكسية على الفقراء *

رد المحتار .XXX

٣٨٤ - قوله و جاز وقف لقن على مصالح الرباط - ظاهره جواز وقفه استقلالا ويؤيده انه ذكره في الفتح عن الخلاصة في مسائل وقف المنقول الذي جرى فيه التعامل فكان ينبغي للشارح ذكره بعد قول المصنف و منقول فده تعامل لئلا يتوهم ان المراد انه وقف تبعا للرباط كما توهمه في البحر*

٣٨٥ - و لو باع العاجز و اشترى بثمنه عددا مكانه جاز *

وقال في موضع آخر و كذلك الدواليب و الآلات يبيعها او يشتري بثمنها ما هو اصلح للوقف *

قوله كما صح وقف مشاع قضى بجوازه - و يصير بالقضاء متفقا عليه و الخلاف في وقف المشاع مبني على اشتراط التسليم و عدمه لان القسمة من اتمامه فابو يوسف رح اجازه لانه لم يشترط التسليم و محمد رح لم يجزه لاشتراطه التسليم *

و قدمنا ان محل الخلاف فيما يقبل القسمة بخلاف ما لا يقبلها فيجوز اتفاقا الا في المسجد و المقبرة *

قوله لانه مجتهد فيه - اي يسوغ فيه الاجتهاد لعدم مخالفته لنص او اجماع *

قوله فللحنفي المقلد الخ - و لذا قال في الدرر من كتاب القضاء عند الكلام على قضاء القاضي بخلاف مذهبه ان المراد به خلاف اصل المذهب كالحنفي

اذا حكم على مذهب الشافعي و اما اذا حكم الحنفي بما ذهب اليه ابويوسف رح و محمد رح او نحوهما من اصحاب الامام فليس حكما بخلاف رايه *

[فقد افاد ان اقوال اصحاب الامام غير خارجة عن مذهبه فقد نقلوا عنهم انهم ما قالوا قولا الا هو مروي عن الامام كما اوضحت ذلك في شرح منظومتي في رسم المفتي *]

قوله لاختلاف الترجيح- فان كلا من قول ابي يوسف رح و قول محمد رح صحح بلفظ الفتوى كما مر *]

قوله قولان مصححان - اى و قد تساويا في لفظ التصحيح و الا فالاولى الاخذ بما هو آكد في التصحيح كما لو كان احدهما بلفظ الصحيح و الاخر بلفظ عليه الفتوى فان الثاني اقوى و كذا لو كان احدهما في المتون او كان ظاهر الرواية او كان عليه الاكثر او كان هو الارفق بالناس فانه اذا صح هو و مقابله كان الاخذ به اولى كما قدمناه في اول الكتاب *

قوله باحدهما - اي باي واحد منهما اراد لكن اذا قضى باحدهما في حادثة ليس له القضاء فيها بالقول الاخر [نعم يقضي به في حادثة غيرها] و كذا المفتي و ينبغي ان يكون مطمح نظره الى ما هو الارفق و الاصلح و هذا معنى قولهم ان المفتي يفتي بما يقع عنده من المصلحة اى المصلحة الدينية لا المصلحة الدنيوية *

قوله كل منقول قصدا - اما تبعا للعقار فهو جائز بلا خلاف عندهما كما مر كما لا خلاف في صحة وقف السلاح و الكراع اى الخيل للآثار المشهورة و الخلاف فيما سوى ذلك فعند ابى يوسف رح لا يجوز و عند محمد رح يجوز ما فيه تعامل من المنقولات و اختاره اكثر فقهاء الامصار كما في الهداية و هو الصحيح كما في الاسعاف و هو قول اكثر المشائخ كما في الظهيرية لان القياس قد يترك بالتعامل و نقل في المجتبى عن السير جواز وقف المنقول مطلقا عند محمد رح و اذا جرى فيه التعامل عند ابي يوسف رح و تمامه في البحر و المشهور الاول *

قوله بل و دراهم و دنانير - عزاه في الخلاصة الى الانصاري و كان من اصحاب زفر رح و عزاه في الغاية الى زفر رح حيث قال و عن زفر شرينبلالية *

و قال المصنف في المنح و لما جرى التعامل في زماننا في البلاد الرومية و غيرها في وقف الدراهم و الدنانير دخلت تحت قول محمد المفتي به في

وقف كل منقول فيه تعامل كما لا يخفى فلا يحتاج على هذا الى تخصيص القول بجواز وقفها بمذهب الامام زفر من رواية الانصاري و الله تعالى اعلم و قد افتى مولانا صاحب البحر بجواز وقفها و لم يحك خلافا انتهى *

قال الرملي لكن في الحاقها بمنقول فيه تعامل نظر اذ هي مما لا ينتفع بها مع بقاء عينها على ملك الواقف و افتاء صاحب البحر بجواز وقفها لا حكاية خلاف لا يدل على انه داخل تحت قول محمد المفتي به في وقف منقول فيه تعامل لاحتمال انه اختار قول زفر رح و افتى به و ما استدل به في المنح من مسئلة البقرة الآتية ممنوع بما قلنا اذا ينتفع بلبنها و سمنها مع بقاء عينها لكن اذا حكم به حاكم ارتفع الخلاف انتهى ملخصا *

قلت ان الدراهم لا تتعين بالتعيين فهي و ان كانت لا ينتفع بها مع بقاء عينها لكن بدلها قائم مقامها لعدم تعينها فكانها باقية و لاشك في كونها من المنقول فحيث جرى فيها تعامل دخلت فيما اجازه محمد رح و لهذا لما مثل محمد باشياء جرى فيها التعامل في زمانه قال في الفتح ان بعض المشائخ زادوا اشياء من المنقول على ما ذكره محمد رح لما رأوا جريان التعامل فيها و ذكر منها مسئلة البقرة الآتية و مسئلة الدراهم و المكيل حيث قال ففي الخلاصة وقف بقرة على ان ما يخرج من لبنها و سمنها يعطى لابناء السبيل مال ان كان ذلك في موضع غلب ذلك في اوقافهم رجوت ان يكون جائزا و عن الانصاري و كان من اصحاب زفر فيمن وقف الدراهم او ما يكال او ما يوزن ايجوز ذلك قال نعم قيل و كيف قال يدفع الدراهم مضاربة ثم يتصدق بها في الوجه الذي وقف عليه و ما يكال و يوزن يباع و يدفع ثمنه لمضاربة او بضاعة قال فعلى هذا القياس اذا وقف كرا من الحنطة على شرط ان يقرض للفقراء الدين لا بذر لهم ليزرعوه لانفسهم ثم يوخذ منهم بعد الادراك قدر القرض ثم يقرض لغيرهم من الفقراء ابدا على هذا السبيل يجب ان يكون جائزا *

و بهذا ظهر صحة ما ذكره المصنف من الحاقها بالمنقول المتعارف على قول محمد المفتى به و انما خصوها بالنقل عن زفر لانها لم تكن متعارفة اذ ذاك و لانه هو الذي قال بها ابتداء *

قال في النهر و مقتضى مامر عن محمد رح عدم جواز ذلك اى وقف الحنطة في الاقطار المصرية لعدم تعارفه بالكلية نعم وقف الدراهم و الدنانير تعورف في الديار الرومية انتهى *

قوله لان التعامل يترك به القياس - فان القياس عدم صحة وقف المنقول لان من شرط الوقف التابيد و المنقول لا يدوم و التعامل كما فى البحر عن التحرير هو الاكثر استعمالا و في شرح البيري عن المبسوط ان الثابت بالعرف كالثابت بالنص انتهى *

و تمام تحقيق ذلك في رسالتنا المسماة نشر العرف في بناء بعض الاحكام على العرف و ظاهر مامر في مسئلة البقرة اعتبار العرف الحادث فلايلزم كونه من عهد الصحابة و كذا هو ظاهر ما قدمناه آنفا من زيادة بعض المشائخ اشياء جرى التعامل فيها و على هذا فالظاهر اعتبار العرف فى الموضع او الزمان الذي اشتهر فيه دون غيره فوقف الدراهم متعارف في بلاد الروم دون بلادنا و وقف الفاس و القدوم كان متعارفا في زمن المتقدمين و لم نسمع به في زماننا *

فالظاهر انه لا يصح الان و لئن وجد نادرا لا يعتبر لما علمت من ان التعامل هو الاكثر استعمالا فتأمل *

قوله لحديث الخ - رواه احمد [في كتاب السنة] *

قوله و متاع - ما يتمتع به فهو عطف عام على خاص فيشمل ما يستعمل فى البيت من اثاث المنزل كفراش و بساط و حصير لغير مسجد و الاواني والقدور نعم تعورف وقف الاواني من النحاس و نص المتقدمون على وقف الاواني و القدور المحتاج اليها في غسل الموتى *

قوله و هذا - اى جواز وقف المنقول المتعارف *

قوله و الحق فى البحر السفينة بالمتاع - اى فلا يصح لكن قال شيخ مشائخنا السائحاني انهم تعاملوا وقفها فلا تردد في صحته انتهى و كانه حدث بعد صاحب البحر و الحق فى المنح وقف البناء بدون الارض *

٣٨٧ جاز وقف الاكسية الخ قلت و في زماننا قد وقف بعض المتولين على المؤذنين الفراء شتاء ليلا فينبغي الجواز سيما على مامر عن الزاهدي فتدبر شرح الملتقى اى ما ذكره الزاهدي فى المجتبى من جواز وقف المنقول مطلقا عند محمد رح *

قوله ان يحصون جاز - هذا الشرط مبني على ما ذكره شمس الائمة من الضابط وهو انه اذا ذكر للوقف مصرفا لابد ان يكون فيهم تنصيص على الحاجة حقيقة كالفقراء او استعمالا بين الناس كالايتامى والزمنى لان الغالب فيهم الفقر

فيصح للاغنياء و الفقراء منهم ان كانوا يحصون و الا فلفقرائهم فقط [و متى ذكر مصرفا يستوى فيه الاغنياء و الفقراء فان كانوا يحصون صح باعتبار اعيانهم و الا بطل] *

و روى عن محمد رح ان مالا يحصى عشرة و عن ابي يوسف رح مائة و هو الماخوذ به عند البعض و قيل اربعون و قيل ثمانون *

و الفتوى على انه مفوض الى راى الحاكم اسعاف و بحر *

XXXI. الطحطاوي الجزء ٢ صفحة ٥٣٩

و المشهور ان محمدا هو الذي قال بصحة ما تعورف وقفه منه و أبا يوسف يمنعه *

و حكي في المجتبى ان محمدا يجوزه مطلقا و ان ابا يوسف يجوز اذا جرى به التعامل *

و ظاهر النهر قصر صحة وقفه في اماكن تعورف وقفه فيهم و نازعه ابو السعود في ذلك فراجعه - قوله بالحكم به - اى بوقف الدراهم و الدنانير اى بصحته *

قوله كثياب - يخص هذه الاكسية الاتي ذكرها *

قوله و متاع - هو ما ينتفع به مما لم تجر العادة بوقفه كبابوج و حصر يجلس عليها في غير مسجد و نحوه *

قال في البحر و خرج الحيوان و الذهب و الفضة و لو حليا لان الوقف فيه لا يتأبد *

و في شرح الحموي قد جرى التعامل بوقف آلة القيانة فينبغي ان يصح *

قوله و هذا - اى ما ذكر من التفصيل *

قوله و الحق في البحر السفينة بالمتاع - اذا لم يجر التعارف بوقفها وقد جرى في زماننا العرف في سفن بحر القلزم فان بعضها وقف على نقل حلال الحرمين افاده الحلبي *

قوله جاز وقف الاكسية على الفقراء *

XXXII. العالمگيريه - الجزء الثاني صفحة ٩٧٢

فان ضعف الرقيق عن العمل فان له ان يبيعه و يشتري بثمنه غلاما مكانه فان لم يجد بثمنه غلاما مكانه فاراد ان يزيد في ذلك من غلة الارض فلا بأس بذلك *

و كذلك الحكم في الدواب و آلات الزراعة اذا وقفت مع الارض *

و لو قتل فاخذ ديته فعلى القيم ان يشتري بها آخر كذا في فتح القدير [و الاسعاف] *

و اما وقف المنقول مقصودا ان كان كراعا او سلاحا يجوز و فيما سوى ذلك ان كان شيئا لم يجر التعارف بوقفه كالثياب و الحيوان لا يجوز عندنا *

و ان كان متعارفا كالفاس و القدوم و الجنازة و ثياب الجنازة و ما يحتاج اليه من الاواني و القدور في غسل الموتى و المصاحف قال ابو يوسف رح انه لا يجوز و قال محمد يجوز و اليه ذهب عامة المشائخ رح منهم الامام السرخسي كذا في الخلاصة و هو المختار *

و الفتوى على قول محمد رح *

و لو جعل جنازة ... *

وقف المصحف يجوز *

و اختلف الناس في وقف الكتب [جوزه الفقيه ابو الليث رح و عليه الفتوى كذا في فتاوى قاضيخان] *

[اذا جعل ظهر دابته او غلة عبده في المساكين لا يصح في قول علمائنا رح كذا في المحيط *]

رجل وقف بقرة على ان ...جاز كما يجوز ماء السقاية كذا في الظهيرية *

ولا يجوز وقف نعل البقر [وقف البناء من غير وقف الاصل لم يجز و هو الصحيح *]

و كذلك وقف الكردار بدون وقف الارض يجوز و هو المختار كذا في المحيط *]

ولا يجوز وقف البناء في ارض ... *

ان وقف حوانيت الاسواق يجوز [ان كانت الارض باجارة] *

وقف العلمان و الجواري على مصالح الرباط يجوز *

و اما وقف مالا ينتفع به الا بالاتلاف كالدهب و الفضة و الماكول و المشروب فغير جائز في قول عامة الفقهاء *

و المراد بالدهب و الفضة الدراهم و الدنانير و ما لحس بحلي كذا في فتح القدير *

و لو وقف الدراهم او مكيلا او موزونا لم يجز و قيل في موضع يتعارفوا ذلك يعني بالجواز [قيل كيف قال الدراهم يقرض للفقراء ثم يقبضها او يدفع مضاربة و يتصدق بالربح و الحنطة تقرض للفقراء يزرعون ثم يوخذ منهم و الثياب و الاكسية تعطى للفقراء ليلبسونها عند حاجتهم ثم ياخذوا كذا في الفتاوى العتابية *]

العالمگيريه الجزء السادس .XXXIII

و في فتاوى ابى الليث اذا وقف بقرة على رباط على ان ما يخرج من البانها و سمنها يعطي لابناء السبيل قال بعض مشائخنا ان كان في موضع يغلب ذلك في او قافهم رجوت ان يكون جائزا و قال بعضهم بالجواز مطلقا لانه جرى التعارف بذلك في بلاد المسلمين *

عمدة القاري الجزء السادس صفحة ٥١٦ .XXXIV

ص - باب وقف الدواب و الكراع و العروض و الصامت - ش . اى هذا باب في بيان وقف الدواب الى آخره و اشار بهذه الترجمة الى جواز وقف المنقولات و الكراع اسم للخيل ... . و العروض جمع عرض و هو المتاع لا نقد فيه و الصامت ضد الناطق و اريد به النقد من المال - ص . قال الزهري فيمن جعل الف دينار في سبيل الله و دفعها الى غلام له تاجر يتجر بها و جعل ربحه صدقة للمساكين و الاقربين هل للرجل ان ياكل من ربح ذلك الالف شيئا و ان لم يكن جعل ربحه صدقة في المساكين قال ليس له ان ياكل منها *

فتح الباري .XXXV

[باب وقف الدواب و الكراع و العروض و الصامت - هذه الترجمة معقودة لبيان وقف المنقولات - و الكراع اسم لجميع الخيل فهو بعد الدواب من عطف

الخاص على العام و العروض جمع عرض و هو جميع ماعدا النقد من المال - و الصامت بالمهملة بلفظ ضد الناطق و المراد به من النقد الذهب و الفضة و وجه اخذ ذلك من حديث الباب المشتمل على قصة فرس عمر انها دالة على صحة وقف المنقولات فيلحق به ما في معناه من المنقولات اذا وجد الشرط او هو تحبيس العين فلا تباع و لا توهب بل ينتفع بها و الانتفاع في كل شي بحسبه - قوله و قال الزهري الخ - هو ذهاب من الزهري الى جواز مثل ذلك و قد اخرجه عنه هكذا ابن وهب في موطئه عن يونس عن الزهري ثم ذكر المصنف حديث ابن عمر في قصة عمر في حمله على الفرس في سبيل الله ثم وجده يباع و قد تقدم شرحه مستوفى في كتاب الهبة واعترضه الاسماعيلي فقال لم يذكر في الباب الا الاثر عن الزهري و الحديث في قصه الفرس التي حمل عليها عمر فقط و اثر الزهري خلاف ما تقدم من الوقف الذي اذن فيه النبي صلعم لعمر بان يحبس اصله و ينتفع بثمرته و الصامت انما ينتفع به بان يخرج بعينه الى شيء غيره و ليس هذا بتحبيس الاصل و الانتفاع بالثمرة بل المأذون فيه ما عاد عده نفع بفضل كالثمرة و الغلة و الارتفاق و العين قائمة فاما مالا ينتفع به بالة عينه فلا اه . ملخصا] و جواب هذا الاعتراض ان الذي حصره في الانتفاع بالصامت ليس بمسلم بل يمكن الانتفاع بالصامت بطريق الارتفاق بان يحبس مثلا منه ما يجوز لمسه للمرأة فيصح بان يحبس اصله و ينتفع به النساء باللبس عند الحاجة اليه كما تقدم توجيهه و الله اعلم *

فتح الباري XXXVI.

باب اذا تصدق او وقف بعض ماله او بعض رقيقه او دوابه فهو جائز

هذه الترجمة معقودة لجواز وقف المنقول [و المخالف فيه ابو حنيفة رح و يوخذ منها جواز وقف المشاع و المخالف فيه محمد بن الحسن لكن خص المنع بما يمكن قسمته و احتج له الجوري و هو من الشافعية بان القسمة بيع و بيع الوقف لايجوز و تعقب بان القسمة افراز معذور] و وجه كونه يؤخذ منه وقف المشاع و وقف المنقول هو من قوله او بعض رقيقه او دوابه فانه يدخل فيه ما اذا وقف جزأ من العبد او الدابة او وقف احد عبديه او فرسيه مثلا فيصح كل ذلك عند من يجيز وقف المنقول و يرجع اليه في التعيين - [قوله قلت يا رسول الله ان من توبتي - هذا طرف من حديث كعب بن مالك في

قصة تخلفه عن غزوة تبوك و سياتي الحديث بطوله في كتاب المغازي مع استيفاء شرحه و شاهد الترجمة منه قوله امسك عليك بعض مالك فانه ظاهر في امره باخراج بعض ماله من غير تفصيل بين ان يكون مقسوما او مشاعا فيحتاج من منع وقف المشاع الى دليل المنع و الله اعلم] *

XXXVII. شرائع الاسلام صفحة ٢١٨

كتاب العارية . . . و الكلام في فصول اربعة الاول فى المعير ... و الثاني فى المستعير ... الثالث فى العين المعارة وهي كل ما يصح الانتفاع به مع بقاء عينه *

شرائع الاسلام صفحة ٢٢٣

و يجوز استيجار الدراهم والدنانير ان تحققت لها منفعة حكمية مع بقاء عينها *

XXXVIII. شرائع الاسلام صفحة ٢٣٣

الاول في شرائط الموقوف وهي اربعة ان يكون عينا مملوكة ينتفع بها مع بقائها و يصح إقباضها فلا يصح وقف ماليس بعين كالدين و كذا لو قال وقفت فرسا او ناضحا او دارا و لم يعين و يصح وقف العقار و الثياب و الآلات المباحة و ضابطه كل ما يصح الانتفاع به منفعة محللة مع بقاء عينه و كذا يصح وقف الكلب المملوك و السنور لامكان الانتفاع و لا يصح وقف الخنزير لانه لا يملكه المسلم ولا وقف الآبق للتعذر التسليم و هل يصح وقف الدنانير و الدراهم قيل لا و هو الاظهر لانه لا نفع لها الا التصرف فيها و قيل يصح لانه قد يفرض لها نفع مع بقاءها *

XXXIX. مسالك الافهام - المطبوعة بطهران صفحة ٣٦٥

قوله و هل يصح وقف الدنانير و الدراهم الخ و الاقوى الجواز لان عدة المنافع مقصودة ولا يمنع قوة غيرها عليها *

XL. المدونة الكبرى - الجزء الثاني صفحة ١٠٣

[في زكاة الثمار المحبسة و الابل و الاذهاب]

فقلت لمالك أو قيل له فلو أن رجلا حبس مائة دينار موقوفة يسلفها الناس و يردونها على ذلك جعلها حبسا هل ترى فيها الزكاة - فقال - نعم ارى

فيها الزكاة - قلت له - فلو أن رجلا جعل مائة دينار في سبيل الله تفرق او على المساكين فحال عليها الحول هل تؤخذ منها الزكاة - فقال - لا هذه كلها تفرق و ليست مثل الاولى *

XLI. المختصر لسيدي خليل صفحة ١٨٤

صح وقف مملوك و ان باجرة ولو حيوانا و رقيقا كعبد على مرضي لم يقصد ضررة و في كطعام تردد *

XLII. الدردير - صفحة ٧٠ الى ٧٢ و الدسوقي - صفحة ٧٢ الجزء الرابع

(وقف مملوك) ولو بالتعليق (كان) ملكت دار فلان فهي وقف او كان مشتركا شائعا فيما يقبل القسمة و يجبر عليها الواقف ان ارادها الشريك و اما ما لا يقبلها فهيه قولان مرجحان و على الصحة يجبر الواقف على البيع ان اراده شريكه و يجعل ثمنه في مثل وقفه و اراد بالمملوك ما يشمل ملك الذات و ملك المنفعة فلذا قال - (و ان) كان الملك المدلول عليه بمملوك (باجرة) كدار استاجرها مدة معلومة فله وقف منفعتها في تلك المدة [و ينقضي الوقف بانقضائها] لانه لا يشترط فيه التابيد كما سياتي و شمل قوله باجرة من استاجر دارا محبسة مدة فله تحبيس منفعتها على مستحق آخر غير المستحق الاول في تلك المدة و اما المحبس عليه فليس له تحبيس المنفعة التي يستحقها لان الحبس لا يحبس (ولو) كان المملوك (حيوانا ورقيقا) من عطف الخاص على العام اى فيصح وقفه و يلزم وكذا الثياب على المذهب (كعبد على مرضي) لخدمتهم حيث (لم يقصد) السيد (ضررة) بذلك و الا لم يصح و مثل العبد الامة على اناث وليس له حينئذ وطؤها لان منفعتها صارت بوقفها للغير كالمستعارة المرهونة (و في) جواز (وقف كطعام) مما لا يعرف بعينه اذا غيب عليه كالنقد وهو المذهب ويدل له قول المصنف في الزكاة و زكيت عين وقفت للسلف و عدم الجواز الصادق بالكراهة و المنع (تردد) وقيل ان التردد في غير العين من سائر المنقليات واما العين فلا تردد فيها بل يجوز وقفها قطعا لانه نص المدونة و المراد (١) وقفه للسلف و ينزل رد بدله بقاء عينه واما ان وقف مع بقاء عينه فلا يجوز اتفاقا ان لا منفعة شرعية تترتب على ذلك *

(١) قوله و المراد الخ - اشار بهذا الى ان محل التردد حيث XLIII.
وقف للانتفاع به ورد مثله و اما اذا وقف مع بقاء عينه كما لو وقف لاجل تزيين
الحوانيت فانه يمنع اتفاقا و يكون الوقف باطلا *

الدردير - صفحة ٤١٢ و الدسوقي - صفحة ٤١٢ الجزء الاول XLIV.

(و زكيت) وجوبا (عين) ذهب او فضة (وقفت (٢) للسلف) اى يزكيها
الواقف او المتولي عليها ضمنا ان مر عليها حول من يوم ملكها *

(٢) قوله وقفت للسلف - اى وقفت لكون المحتاج يتسلفها XLV.
و يرد بدلها عند يساره و سواء وقفت على معينين او غيرمعينين وما ذكره ميني
على المعتمد من جواز وقف العين للسلف *

و حاصل ماذكره ان العين الموقوفة للسلف اذا لم يتسلفها XLVI.
احد وجب على الناظر او الواقف زكاتها كل عام ان مر لها حول من يوم ملكها *

غاية البيان XLVII.

صحته من مالك تبرعا بكل عين جاز ان ينتفعا
بها مع البقا منجزا على موجود آن تمليكه ناهلا

شرح غاية البيان على زبد الشيخ احمد بن رسلان XLVIII.
للعالم العلامة شمس الدين محمد بن احمد الرملى الانصاري رحمهم الله
تعالى المطبوع بمصر صفحة ٢٢٨ *

باب الوقف

هو لغة الحبس و شرعا حبس مال يمكن الانتفاع به مع بقاء عينه
بقطع التصرف في رقبته على مصرف مباح و الاصل فيه خبر مسلم اذا مات
بن آدم انقطع عمله الا من ثلاث صدقة جارية او علم ينتفع به او ولد صالح
يدعو له و الصدقة الجارية محمولة عند العلماء على الوقف *

(عين جاز ان ينتفع بها مع البقا) فلا يصح وقف آلات اللهو و الكلب المعلم
و الطعام و الرياحين المشمومة المحصودة و لا وقف الدراهم و الدنانير و يصح

وقف عقار و منقول و شائع و مقسوم و المصائد و العيون و الابار و الاشجار للثمار و البهائم للبن و الصوف و الوبر و البيض و الابزاء *

XLIX. القدوري صفحة ٣٠١ كتاب الوقف

و يصح وقف العقار و لا يجوز وقف ما ينقل و يحول الا اذا كان فيه تعامل الناس و قال ابو يوسف رح اذا وقف ضيعة ببقرها و اكرتها و هم عبيده جاز و قال محمد رح يجوز حبس الكراع و السلاح *

L. الجوهرة النيرة الجزء صفحة ١٩

قال الخجندي رح لا يجوز وقف المنقول الا ان يكون تبعا لغيره وهو ان يقف ارضا فيها اثوار و عبيد لمصالحها فيكونون وقفا معها تبعا او جرت العادة بوقفه كالمر لحفر القبور او الجنازة و ثياب الجنازة *

ولو وقف الاشجار القائمة لا يجوز قياسا و يجوز استحسانا [و ينتفع بثمارها دون اعصابها الا فيما يعاد قطعه ليبنى به كشجر الخلاف وهو الضرح] *

قال فى الواقعات اذا وقف ثورا على اهل قرية للابزاء على بقرهم لا يصح لان وقف المنقول لا يصح الا فيما فيه تعارف ولا تعارف في هذا *

و عند الشافعي رح يجوز *

قوله و قال محمد رح يجوز حبس الكراع و السلاح في سبيل الله - الكراع هو الخيل و ابو يوسف رح معه على ما قالوا وهو استحسان عنده قال محمد رح ويجوز وقف ما فيه تعامل من المنقولات كالفاس و المر و القدوم و المنشار و الجنازة و ثيابها و القدور و المصاحف و الكتب *

و عند ابي يوسف رح لا يجوز فاكثر فقهاء الامصار على قول محمد و اذا صح الوقف لم يجز بيعه ولا تمليكه الا ان يكون مشاعا عند ابي يوسف رح [اما امتناع البيع و التمليك فلانه قد زال ملكه عنه] *

LI. فتاوى سراجيه كتاب الوقف باب وقف المنقول صفحة ٣٩٧

وقف المنقول لا يصح الا تبعا او الا اذا كان متعارفا *

رجل جعل فرسه جديدا في سبيل الله تعالى جاز باعتبار العرف و كذا اذا وقف سلاحا او كراعا في سبيل الله تعالى *

او وقف الكتاب او المصاحف او وقف ضيعة مع السير و آلات الحراثة يجوز *
[ديباج الكعبة اذا صار خلقا لا يجوز اخذه لكن يبيعه السلطان و يستعين به على امر الكعبة] *

LII. شرح الوقاية - المطبوع بكلكته - كتاب الوقف - ٦٣٢

و عن محمد رح صح وقف منقول فيه تعامل كالفاس و المر و القدوم و المنشار و الجـــازة و ثيابها و القدر و المرجل و المصحـــف و عليه اكثر فقهاء الامصار *

LIII. ذخيرة العقبى

و قال محمد رح ما تعارف الناس وقفه من المنقول فانه يجوز استحسانا كالاشياء المذكورة في المتن و ما لم تتعارف الناس وقفه لا يجوز كوقف الثياب و الحيوان وغيرهما من الامتعة و قال الشافعي و احمد و مالك رح ان وقف المنقول يصح مقصودا اذا كان المنقول شيئا يمكن الانتفاع به مع بقاء عينه اى شيء كان و اجمعوا انه لا يصح وقف الدراهم و الدنانير - وجه قول الشافعي رح القياس على العقار و الخيل و الجامع امكان الانتفاع مع بقاء العين و نحن نقول هذا القياس ضعيف لانه قياس ما يبقى على ما لا يبقى كذا في البيانية و قد فهم من المعراجية ان ما لا يجوز وقفه من المحرمين هو نفس الدراهم و الدنانير المضروبين و اما الحلي فيجوز وقفه عند احمد و الشافعي رح لما ان حفصة رض بنت عمر رض زوجة النبي صلى الله عليه وسلم اتخذت حليا بعشرين الفا فحبسته على نساء آل الخطاب فكانت لا تخرج زكوته و عن احمد رح لا يصح وقفها و انكر المحدث و قيل اذا صححنا اجارة الدراهم و الدنانير يجوز وقفها و ليس بشيء انتهى كلام المراة و قال في البزازية اذا وقف الدراهم او الدنانير او الطعام [او ما يكال] يجوز [و يدفع النقد و ثمن غير النقد كالمكيل و الموزون بعد البيع مضاربة او بضاعة و يصرف الربح الحاصل الى ما وقف عليه] و قال في الخانية و عن زفر رح وجل وقف الدراهم [او الطعام او ما يكال او ما يوزن قال] يجوز [قيل له و كيف يكون قال تدفع الدراهم مضاربة ثم تدفع نفقتها في الوجه الذي وقف عليه و ما يكال و يوزن يباع و يدفع ثمنه بضاعة او مضاربة انتهى] و نحن نقول وجه التوفيق بين ما ذكر في هذين المعتبرين من جواز وقف النقود و الطعام و بين ما ذكر في شروح الهداية من عدم جوازة ان الشراح لا تتصورون امكان الانتفاع بها مع بقاء اصلهـــا و قائل ما في هذين الكتابين يتصورة كما ترى و الحق في الجواب ان التوفيق هنا ليس بواجب لان قائل كل

من الكلامين طائفتان متخالفتان كما ترى والتوفيق انما يجب بين كلمات قوم يتوافقون في المذاهب و الاقوال كما لايخفى فليتأمل - [قال - وقف منقول فيه تعامل - اى صح الوقف في منقول تعورف بين الناس الوقف فيه كما في هذه الاشياء يؤيد هذا الاستخراج قول صاحب البيان في شرح قول صاحب الهداية وقد وجد التعامل في هذه الاشياء اى في وقف هذه الاشياء و الحاصل ان جواز وقف المنقول عنده من جوزه مبني على كون وقف ذلك متعارفا بين الناس حتى قيل ان وقف رجل بقوة على رباط على ان ما يخرج من لبنها و سمنها يعطى لاناء السبيل ان كان في موضع تعارفوا ذلك جاز كما يجوز ماء السقاية كذا في الخانية]

LIV. فتاوى خيرية الجزء الاول صفحة ١٣٢

سئل - في رجل وقف منقولا فيه تعامل على اولاده الصغار ثم من بعدهم الجهة بر عير منقطعة ثم اقام وصيا على اولاده المذكورين و امره بتعهد الموقوف و حفظه الى ايناس الرشد في احدهم ثم مات الواقف و قام الوصي بما فوض اليه ثم مات مجهلا و ضاع الموقوف و اونس الرشد في احدهم فهل يضمن تركته مجهلا و يوخذ ضمانته من تركته ام لا [وهل اذا اختلف مع ورثته الوصي فادعى انه مات مجهلا و ادعوا انه بين و لم تمت عن تجهيل يقبل قوله ام قولهم] *

اجاب - [اعلم انهم صرحوا بان ولاية الوقف الى وصي الواقف اذا نصبه عند موته وصيا ولم تذكر من امر الوقف شيئا و لو جعل ولاية وقفه لرجل ثم جعل آخر وصيه يكون شريكا للمتولي في امر الوقف الا ان يقول وقفت ارضي على كذا و كذا و جعلت ولايتها لفلان و جعلت فلانا وصيا في تركاتي و جميع اموري فحينئذ ينفرد كل منهما بما فوض اليه كذا في الاسعاف فاذا علمت ذلك -] علمت ان هذا الوصي متول على الوقف المذكور و قد نصوا على ان المتولي اذا مات مجهلا لغلات الوقف لا يضمن و اذا مات مجهلا لمال البدل يضمن و قد استفيد من ضمانه مال البدل ضمانه الدنانير الموقوفة [و هو يفادي في مسئلتنا بالضمان فنقول انه ضامن بالموت عن تجهيل للمنقول الموقوف] *

LV. تنقيح الحامدية

(سئل) في امراة وقفت مبلغا معلوما من الدراهم على ولدي بنتها ... هل يكون الوقف المزبور جائزا *

(الجواب) نعم وافتى بذلك مفتي الدولة العلية المرحوم علي افندي

و في الخانية من وقف المنقول عن زفر رجل وقف الدراهم او الطعام او مايكال او يوزن قال يجوز ... و مثله في الدرر عن الخلاصة عن الانصاري وكان من اصحاب زفر *

LVI. فتاوى قدية صفحة ١٩٦

وقف مائة و خمسين دينارا على مرضى-الذهب الى انسان مضاربة ليستغلها و يصرف الربح اليهم - محيط - وقف الدراهم و المكيل الموزون كذلك *

LVII. فتاوى بزازية خطيه صفحة ٣١٩

وقف المنقول

اذا وقف الدراهم و الدنانير او الطعام او ما يكال او يوزن يجوز و يدفع النقد و ثمن غير النقد كالمكيل و الموزون بعد البيع مضاربة او بضاعة و يصرف الربح الحاصل الى ما وقف عليه *

LVIII. واقعات المفتين صفحة ٧٤

و عن زفر رحمه الله اذا وقف الدراهم او الطعام او ما يكال او ما يوزن يجوز *

حاشية واقعات المفتين نمبر ١

في فتاوى الناطفي عن محمد رح عن عبد الله الانصاري من اصحاب زفر انه يجوز وقف الدراهم و الطعام و المكيل و الموزون *

LIX. [الفتاوى الهندية - الجزء الثاني صفحة ٤٥٢]

سئل - من طرف وكيل المالية بما مضمونه ان شخصا من اهالي مكة المكرمة يدعى الشيخ احمد جلبي له منزل وقف اهلي نظارته و صار شراؤه المميري لاجل الحاقه بسراى حرم جنتمكان المرحوم افنديما الكبير و لكونه وقفا اهليا صار توقيف صرف الثمن لاجل استبداله و الان تقدم الانهاء من وكيل صاحب المنزل المذكور بدعى ان باقي محلات الوقف لازم لها عمارة ضرورية اكثر من مبلغ اربعة آلاف قرش ثمن المنزل المذكور و يريد صرف الثمن لاجل صرفه في عمارة الاماكن المذكورة لكون الاصول احياء الوقف من بعضه *

اجاب - اذا استبدل عقار الوقف استبدالا صحيحا شرعيا أو استولي عليه شخص و ضمن المستولي القيمة لا يصرف الثمن و لا قيمة العقار في العمارة بل يشترى عقار آخر فيكون وقفا بدل الاول و أما ثمن الانقاض اذا بيعت لتعذر عودها أو خوف هلاكها فيصرف في العمارة و يكون لناظر الوقف أخذ ذهبا و صرفه في عمارة باقي الوقف حينئذ و في تنقيح الحامدية من اوائل الوقف بعد كلام عن فتاوى اللطفي فمقتضاه جواز صرف البدل في عمارة الوقف فتأمل و الاستبدال و البيع واحد من حيث المال و الله اعلم أقول و كذا أجاب الشيخ اسمعيل في فتاواه بانه يعمر من مال الاستبدال و لا يستدين حيث كان في الوقف مال لعدم الضرورة اه - و ما ذكره في فتاوى اللطفي هو قوله و قد تصرف أي دراهم البدل في عمارة الوقف الضرورية باذن القاضي فانه يملك ذلك و يستوفي من غلة الوقف بعد العمارة ليشترى بها ما يكون وقفا كالاول و لا تكون ملكا للموقوف عليهم و لا اردا *

LX. صفحة ٤٢١

مطلب في صحة وقف المشاع و لو قابلا للقسمة

سئل - عن حادثة من بيت مال مصر مضمونها ان امرأة وقفت نصف منزلها بمصر على جهة و النصف الآخر اعطته لزوجها الآن ..... فما الحكم في ذلك *

اجاب - الافادة عن ذلك ان وقف المشاع فيه اختلاف و للقاضي الحكم بصحته اعتمادا على قول الامام الثاني ابي يوسف فاذا ثبت ايقاف المرأة المذكورة لنصف المنزل مستوفيا شرائطه يكون للقاضي الحكم بصحة الوقف و لزومه *

LXI. صفحة ٤٢٤

سئل - في رجل وقف نصف حمام مشاعا ليس قابلا للقسمة على نفسه مدة حياته ثم على ذريته *

اجاب - اختلف في صحة وقف المشاع و لو حكم بصحته نفذ ان فيه قولان مصححان و هذا الخلاف فيما يحتمل القسمة اما ما لا يحتملها كما هنا فهو جائز اتفاقا الا في المسجد و المقبرة كما هو مصرح به في كتب المذهب *

LXII. صفحة ٥٥٩

سئل - فهل حيث كان الواقف ناهيا عن الاستبدال لايكون الاستبدال جاريا مجرى الصحة ..... خصوصا و لا مصلحة في هذا الاستبدال *

اجاب - مشمولا ايضا باسم و ختم كل من حضرة الشيخ خليل الرشيدي أمين الفتوى و الشيخ محمد المنصوري الحنفي كلاهما نصه قضية استبدال الوقف بدون شرط من الواقف لذلك فيها اختلاف العلماء قديما و الذي عليه عمل القضاة بالديار المصرية عدم الاستبدال أصلا بدون أمر مولانا السلطان أيد بالنصر عملا بما اشتهر من منعهم من ذلك و القضاء يتخصص بالزمان و المكان و الحادثة فلا ينفذ حكم القاضي فيما هو ممنوع عنه فلا يملك القاضي استبدال الوقف المذكور بدون أمر من له ولاية ذلك سيما مع عدم المصلحة و نهي الواقف عن استبداله فان شرط الواقف كنص الشارع فلا تسوغ مخالفة شرطه بدون وجه شرعي [و الله تعالى اعلم] *

LXIII. صفحة ٦٣٩

سئل - من الروزنامه بما مضمونه ان أولاد الشيخ على خليفة أحد العلماء و زوجته و معتقته السمراء مقيد باسمائهم مرتبات و حصة التزام و براد وقف ذلك و صدر الامر من ولي الامر باجراء ذلك و في الاولاد قصر فبمقتضى منطوق الامر هل هناك محظور شرعي في ايقاف حصص الخمسة اشخاص البلغ أولاد الشيخ *

اجاب - ايقاف اراضي الالتزامات و المرتبات التي من بيت المال المقيدة باسماء اربابها من قبيل الارصاد فتسوغ بامر ولي الامر على مصارفه للمصلحة فاذا أذن ولي الامر المقيد باسمه و هو بالغ بايقاف ذلك على الوجه المذكور بحسبما يصدر به الاذن يجري الايقاف و الارصاد على مقتضاه والله تعالى اعلم *

LXIV. صفحة ٦٥٥

سئل - من طرف أمين بيت المال بما مضمونه ان محمدا صادقا توفى عن بيت المال و وجد في تركته سند فيه نحاس وغيره و بانه وقف على جهة كذا و انه وقف ذلك فهل يصلح بيع ذلك أو يكون وقفا اذا ثبت ما ذكر *

اجاب - قد وقع إختلاف في صحة وقف المنقول و الصحيح الذي عليه

اكثر المشايخ صحة وقف ماجرى بوقفه التعامل و العادة فكل ماجرى التعامل بوقفه من الأشياء المذكورة فالصحيح صحة وقفه و ما لا فلا و الله تعالى اعلم *

LXV. صفحة ٧٥٣

و قد سئل شيخنا العلامة عن واقف شرط في وقفه الدقص و الاضرام ثم نوزع في هذا الشرط و أراد المنازع ابطال الوقف به قائلا ان الدقص هو الابطال و هو مبطل للوقف فحكم القاضي بعدم الابطال و صحة الوقف فهل يسوغ بعد ذلك لآخر ابطاله أو الافتاء بالابطال أم لا *

فاجاب - الوقف المذكور صحيح معمول به و ان لم يحكم الحاكم بصحته و اما شرط الواقف لنفسه نقضه و ابطاله فهو شرط غير صحيح على ما هو المختار المفتوى و ما نقل عن أوقاف هلال و الخصاف من ان الوقف يبطل بهذا الشرط خلاف المختار للفتوى صرح بذلك العلامة قاسم بن قطلوبغا و الشيخ الطوسي في فتاويهما و بعله الطرسوسي عن التتارخانية و الفتاوى الكبرى ثم بعد ما حكم الحاكم بالصحة لايجوز الافتاء بالابطال و لا يعمل بذلك الفتوى والله تعالى أعلم انتهى و قد صرح العلماء بأنه ينفى بكل ما هو أنفع للوقف مما اختلف فيه العلماء و العمل جار على صحة الأوقاف المشروط فيها ذلك ان كثيرا ما يوجد مثل هذا الشرط فى الاوقاف مع اقرار تلك الأوقاف على صحة وقفها و العمل بموجب هذا الايقاف و عدم الالتفات لهذا الشرط و حينئذ فالذي ينبغي التعويل عليه القول بصحة الوقف *

LXVI. صفحة ٧٥٤

سئل - من قاضي سيوط في ٢٣ محرم سنة ١٢٩٢ ما نصه اما بعد فقد وقعت لنا حادثة محصلها ان رجلا يملك طاحونة و معمل زجاج أرضا و بناء و حصصا في نخل مزروع في أرض خراجية على وجه القرار وقف ما ذكر و هو يملكه وقفا منجزا من سنة ١٢٧٣ على مسجد انشا بناءه *

اجاب - نعم الوقف المذكور على هذا الوجه صحيح على ما عليه العمل مع جريان التعامل في وقف البناء و الغراس الموضوعين بحق القرار بدون الارض و هذا حيث لا مانع *

LXVII. صفحة ٨٠٥

اجاب - اذا تخربت اماكن الوقف و احتاجت للعمارة الضروريه لا يسوغ للناظر أن يصرف شيأ من ريعه لمستحقيه قبل الصرف على عمارته المذكورة و ان لم يشرط الواقف أن يبدأ من ريعه بعمارته اذ هي مقدمة على مستحقي ريعه بدون شرط فمع شرط التقديم أولى بل عند الشرط المذكور يجب على الناظر امساك ما تحتاج اليه العمارة في المستقبل و ان كان الآن لا يحتاج الموقوف الى العمارة على القول المختار للفقيه ابى الليث ففي تنقيح الحامدية عن الاشباه ان الواقف اذا شرط تقديم العمارة ثم الفاضل عنها للمستحقين كما هو الواقع في أوقاف القاهرة فانه يجب على الناظر امساك قدر ما تحتاج اليه العمارة في المستقبل *

LXVIII. صفحة ٨٢٢

[سئل - في أرض مملوكة استأجرتها امرأة من مالكها مسانهة كل سنة باجرة معلومة اجارة صحيحة و قبضها و اذنها مالك الارض بالبناء و الغرس و العمارة و التجديد المأذون لها على ان نالته أو عرسته أو جددته يكون لها ملكا طلقا بحق البقاء و القرار و قبلت منه ذلك ثم انشأت المأذون لها حال بقاء الاذن بناء و عرست غراسا و جددت عمارة ثم أرادت وقف البناء و الغراس و العرف جار بوقف البناء و الغراس على هذا الوجه و جرى به التعامل فهل يجوز لها ذلك و يكون وقفا شرعيا اذا صدر مستوفيا شرائطه المعتبرة شرعا أفيدوا الجواب] *

اجاب - وقف البناء و الغراس دون الارض في صحته اختلاف و الذي عليه العمل صحته حيث جرى به التعامل و العرف *

LXIX. الفتاوى المهدية - الجزء الثالث - صفحة ١٦٣

سئل - بافادة واردة من المحافظة مورخة ٢٢ جمادى الاولى سنة ١٢٧٩ مضمونها طلب افادة الحكم الشرعي في بيع مبلغ كان في جهة بيت المال باسم امرأة تسمى نسوخ الحبشية ماتت و كانت المصلحة المذكورة دفعته للقومبانيه المجيدية وابت رجل ورثته لتلك المرأة بعد موتها باعلام شرعي فادعى شخص نصراني شراء ذلك من الوارث المذكور و بطلب هذا المبلغ وقائضه *

اجاب - ما صار اجراؤه في هذه القضية اولا و آخرا لم يكن على مقتضى

الشرع و بيع المبلغ الكائن بالقومبانية و بيت المال باسم نسوخ الحبشية سواء كان دينا او عينا لا يصح من وارثها و الحال هذه ولو فرض انه مملوك لها و انه انتقل لوارثها بطريق الميراث فهو بيع فاسد فسبيله الفسخ ورد بدله الى المشتري حيث كان الواقع فيه بيعا و هذا ما يقتضيه الشرع و يكون لمستحق المبلغ الكائن بالقومبانية و بيت المال قبضه من جهته *

LXX. الاشباه و النظائر صفحة ٥٨ و ٥٩ و ٦١ و ٦٥

و اعلم ان اعتبار العادة و العرف ترجع اليه في الفقه مسائل كثيرة حتى جعلوا ذلك اصلا *

و تتعلق بهذه القاعدة مباحث - الاول بماذا تثبت العادة - و في ذلك فروع - الاول العادة في باب الحيض - اختلف فيها فعند ابي حنيفة و محمد رح لا تثبت الا بمرتين - و عند ابي يوسف رح تثبت بمرة واحدة - قالوا و عليه الفتوى - الثاني تعليم الكلب الصائد بترك اكله للصيد بان يصير الترك عادة له - و ذلك بتركه الاكل ثلث مرات *

[فصل في تعارض العرف مع الشرع - فاذا تعارضا قدم عرف الاستعمال خصوصا في الايمان *

قال في البزازية معزيا الى الامام البخاري الذي ختم به الفقه الحكم العام لا يثبت بالعرف الخاص - وقيل يثبت انتهى] *

الحموي - المطبوع بمطبع نول كشور بلكنؤ صفحة ...

[قوله الحكم العام لا يثبت بالعرف الخاص يفهم منه ان الحكم الخاص يثبت بالعرف الخاص و فيه] *

LXXI. الدر المختار - و ردالمحتار - الجزء الرابع صفحة ١٩

بيع البرا آت التي يكتبها الديوان على العمال لا يصح بخلاف بيع حظوظ الائمة لان مال الوقف قائم ثمة ولا كذلك هنا - أشباه وقنية - و معناه انه يجوز للمستحق بيع خبزه قبل قبضه من المشرف *

صفحة ١٩ و ٣٦ و ١٥٥ و ٢٥٧

قوله بخلاف بيع حظوظ الائمة -[بالحاء المهملة و الظاء المشالة] جمع حظ بمعني النصيب المرتب له من الوقف اى فانه يجوز بيعه و هذا مخالف اما

في الصيرفية فان مولفها سئل عن بيع الحظ فاجاب لا يجوز - عن حاشية الاشباه قلت و عبارة الصيرفية هكذا سئل عن بيع الحظ قال لا يجوز فانه لا يخلو اما ان باع ما فيه او عين الحظ لا وجه للاول لانه بيع ما ليس عنده ولا وجه للثاني لان هذا القدر من الكاغذ ليس متقوما بخلاف البراءة لان هذه الكاغذة متقومة *

[عند ابي يوسف تجب قيمته يوم البيع و عند محمد يوم الكساد وهو آخر ما تعامل الناس بها -و في الذخيرة الفتوى على قول ابي يوسف - و في المحيط و التتمة و الحقائق و بقول محمد افتي رفقا بالناس] *

بطل بيع مال غير متقوم كخمر و خنزير فان المتقوم هو المال المباح لانتفاع به شرعا *

[قوله كنقود - فاذا اشترى بهذا الدرهم له دفع درهم غيره و عدم تعين النقد ليس على اطلاقه بل ذلك في المعاوضات و في العقد الفاسد على احدى الروايتين و في المهر ولو بعد الطلاق قبل الدخول و في الذخر و الامانات والهبة و الصدقة والشركة و المضاربة *]

LXXII. [درالمختار صفحة ٢٧٢ و ٢٨١ و ٢٩٣]
و الحل هو الاصل في الاشياء *

LXXIII. لان العادة اذا ذلك كذلك وقد تبدلت فتبدل الحكم
... ان تغير العادة يستلزم تغير النص حتى لو كان صلى الله عليه وسلم حيا نص عليه *

ان النص معلول بالعرف فيكون المعتبر هو العرف في اي زمن كان ولا يخفى ان هذه الاحكام تبني على العرف فيعتبر في كل اقليم و في كل عصر عرف اهله *

LXXIV. الدرالمختار و ردالمحتار- الجزء الرابع صفحة ٣٤٠ و ٣٤٠ و ٣٨٥

دفع ماله مضاربة لرجل جاهل جاز اخذ ربحه مالم يعلم انه اكتسب حراما *

قوله اكتسب حراما الخ -لا توضح المسئلة ما في التتارخانية حيث قال رجل اكتسب مالا من حرام ثم اشترى فهذا على خمسة اوجه اما ان دفع تلك

الدراهم الى البائع او لا ثم اشترى منه بها او اشترى قبل الدفع بها و دفعها و اشترى قبل الدفع بها و دفع غيرها او اشترى مطلقا و دفع تلك الدراهم او شترى بدراهم اخر و دفع تلك الدراهم قال ابو نصر طيب له ولا يجب عليه ان يتصدق الا فى الوجه الاول و اليه ذهب الفقيه ابو الليث لكن هذا خلاف ظاهر الرواية فانه نص فى الجامع الصغير اذا غصب الفا فاشترى بها جارية و باعها بالفين تصدق بالربح و قال الكرخي فى الوجه الاول و الثاني لا يطيب و فى الثلاث الاخيرة يطيب و قال ابوبكر لا يطيب فى الكل لكن الفتوى الآن على قول الكرخي دفعا للحرج عن الناس اه وفى الولوالجية و قال بعضهم لا يطيب فى الوجوه كلها وهو المختار لكن الفتوى اليوم على قول الكرخي دفعا للحرج لكثرة الحرام اه *

LXXV. ردالمحتار الجزء الرابع صفحة ٣٨٥

عليك بما في الخانية لان قاضي خان من اصحاب الترجيح *

LXXVI. و هذا يختلف باختلاف الزمان و المكان كما هو مشاهد

[فتدبر اه افتهى و اجيب ايضا بان التقييد مستفاد من تعليله اه] - اقول - و حيث كانت العلة الخوف وهو ايضا منتف بسفينة التجار في زماننا المعروفة بالبابور فان الغالب فيها السلامة لان التجار الآن لا تطمئن قلوبهم في ارسال اموالهم الا بها بحرا و اذا انتفت العلة انتفي المعلول على انا قدمنا و بابي ان العبرة في حفظ الوديعة العرف وحيث كان العرف كذلك فينبغي ان يقال لافرق بين السفر بها برا او بحرا فى البابور *

LXXVII. الدرالمختار - الجزء الثالث صفحة ٣٠٩ - ردالمحتار - الجزء الثالث صفحه ٣٠٩ و ٣٨٦ الى ٣٧٧

[و اطلق الشافعي اخذ خلاف الجنس للمجانسة فى المالية قال في المجتبى وهو اوسع فيعمل به عند الضرورة *]

قوله و اطلق الشافعي اخذ خلاف الجنس - اى من النقود او العروض لان النقود يجوز اخذها عندنا على ماقررناه انفا قال القهستاني وفيه ايماء الى ان له ان ياخذ من خلاف جنسه عند المجانسة فى المالية و هذا اوسع فيجوز الاخذ به و ان لم يكن مذهبنا فان الانسان يعذر فى العمل به عند الضرورة كما فى الزاهدي *

ردالمحتار - الجزء الاول صفحة ٧٧ المطبوع بالقسطنطنية

[فقد ذكر في حيض البحر - اقوالا ضعيفة ثم قال و في المعراج عن فخر الائمة لو افتي مفت بشيء من هذه الاقوال في مواضع الضرورة طلبا للتيسير كان حسنا ٥]

ردالمحتار - الجزء الثالث صفحة ٥١٠

[قوله خلافا لمالك - فان عنده تعتد زوجة المفقود عدة الوفاة بعد مضي اربع سنين وهو مذهب الشافعي القديم و اما الميراث فمذهبهما كمذهبنا في التقدير بتسعين سنة او الرجوع الى راى الحاكم و عند احمد ان كان يغلب على حاله الهلاك كمن فقد بين الصفين او في مركب قد انكسر او خرج لحاجة قريبة فلم يرجع ولم يعلم خبره فهذا بعد اربع سنين يقسم ماله وتعتد زوجته بخلاف ما اذا لم يغلب عليه الهلاك كالمسافر لتجارة او لسياحة فانه يفوض للحاكم في رواية عنه و في اخرى يقدر بتسعين من مولده كما في شرح ابن الشحنة لكنه اعترض على الناظم بانه لا حاجة للتحقيق الى ذلك اى لان ذلك خلاف مذهبنا فحذفه اولى و قال في الدر المنتقى ليس بأولى لقول القهستاني لوافي به في موضع الضرورة لا باس به على ما اظن اه قلت و نظير هذه المسئلة عدة ممتدة الطهر التي بلغت بروءة الدم ثلاثة ايام ثم امتد طهرها فانها تبقى في العدة الى ان تحيض ثلاث حيض و عند مالك تنقضي عدتها بتسعة اشهر وقد قال في البزازية الفتوى في زماننا على قول مالك و قال الزاهدي كان بعض اصحابنا يفتون به للضرورة *]

حاصله ان هذا التعليل الماز عن الهداية مبني على LXXVIII.
ان الاصل في الاشياء الاباحة وهو راى المعتزلة ... ان نسبة الاباحة الى المعتزلة مخالف لما في كتب الاصول ففي تحرير ابن الهمام المختار الاباحة عند جمهور الحنفية والشافعية اه و في شرح اصول البزدوي للعلامة الاكمل قال اكثر اصحابنا واكثر اصحاب الشافعي ان الاشياء التي يجوز ان يرد الشرع بانا حقها و حرمتها قبل ورود الشرع على الاباحة وهي الاصل فيها حتى ابيح لمن لم يبلغه الشرع ان ناكل ماشاء و ابيه شار محمد في الاكرة حيث قال اكل المبنة وشرب الخمر لم يحرما الا بالنهي فجعل الاباحة اصلا و الحرمة عارض النهي *

LXXIX. نور الانوار شرح المنار المطبوع بمطبع اليوسفي بلكنؤ

صفحة ٢٢١

و الشرط اجتماع الكل و خلاف الواحد مانع كخلاف الاكثر يعني في حين انعقاد الاجماع لو خالف واحد كان خلافه معتبرا ولا ينعقد الاجماع لان لفظ الامة في قوله عم لا تجتمع امتي على الضلالة يتناول الكل فيحتمل ان يكون الصواب مع المخالف *

قال اجتماع الكل اى جميع المجتهدين و قيل اقل ما ينعقد به ثلاثة واليه مال السرخسي لانه اقل الجماعة و قيل اثنان لانه اقل الجمع و قيل ان لم يبق من المجتهدين الا واحد يكون قوله اجماعا لانه عند الانفراد يصدق عليه لفظ الامة كما قال الله تعالى ان ابراهيم كان امة قانتاً *

صفحة ٨٣

و النوع الثاني الثلثة فيما كان جمعا صيغة و معنى كرجال و نساء منكرا مما لم يدخله لام الجنس و يلحق به ما كان معنى فقط كقوم و رهط و انما ينتهي تخصيص هولاء كلها الى الثلثة لان ادنى الجمع الثلثة باجماع اهل اللغة فلو لم يبق تحته ثلثة افراد لفات اللفظ من مقصوده و قال بعض اصحاب الشافعي و مالك ان اقل الجمع اثنان فينتهي التخصيص اليه تمسكا بقوله عليه السلام الاثنان فما فوقهما جماعة فاجاب عنه المصنف بقوله وقوله عليه السلام الاثنان فما فوقهما جماعة محمول على المواريث و الوصايا *

قال على المواريث اى لا على بيان اللغة لانه عليه السلام بعث لبيان الاحكام لا لبيان اللغة *

صفحة ٢٤٣

الاستحسان يكون بالاثر والاجماع و الضرورة و القياس الخفي يعني ان القياس الجلي يقتضي شيئا و الاثر و الاجماع و الضرورة و القياس الخفي يقتضي ما يضادة فيترك العمل بالقياس و يصار الى الاستحسان *

صفحة ٣٧

و الحجة في هذا الباب - اى ان تبدل الملك يوجب تبدل العين حكما ان رسول الله صلى الله و سلم دخل على بريرة يوما فقدمت اليه تمرا و كان القدر يغلي من اللحم فقال عليه السلام الا تجعلين لنا نصيبا من اللحم فقالت

يارسول الله انه لحم تصدق به علي فقال عليه السلام لك صدقة و لنا هدية يعني اذا اخذته من المالك كان صدقة عليك و اذا اعطيته ايانا تصير هدية لنا فعلم ان تبدل الملك يوجب تبدلا في العين و على هذا يخرج كثير من المسائل *

شرح مجمع الحقائق صفحة ٢١٣

الركن الثالث

[فلو لم يوجد في عصر الا مجتهد واحد ففيه قولان - احدهما يكون قوله جماعا لانه عند الانفراد يصدق عليه لفظ الامة كما قال الله تعالى - ان ابراهيم كان امة قانتا - و ثانيهما لا يكون اجماعا لاشتراط العدد - و على اشتراط العدد قيل - اقل ما ينعقد الاجماع ... باثنين ... لان الاجتماع لا يتحقق دون ذلك - و عند شمس الائمة السرخسي الثلاثة - لانه اقل الجماعة *]

ورقة فتوى شرعية ثمنها ستة قروش .LXXX

فضيلتلو افندم صفتي الديار المصرية *

ما قولكم دام فضلكم في رجل هندي حنفي المذهب وقف قراطيس و صكوكا مالية من التي تعرف عند الافرنج بالرانت - او وقف اسهما في قومپانيات تجارية مما تعرف في زماننا هذا في بعض البلاد فهل وقف هذا صحيح جائز في الهند اذا جرى به التعامل في البلاد الرومية مثلا و هل يجوز وقف الفاس و القدوم في زماننا هذا [افيدونا ولكم الاجر افندم من السائل] *

حسن بك فهمي سكرتير

دولة الغازي مختار باشا

الحمد لله وحده و الصلوة و السلام على من لا نبي بعده و على آله و صحبه نص العلماء على ان محل الوقف المال المتقوم بشرط ان يكون عقارا او منقولا فيه تعامل فالصكوك المالية المذكورة ان كانت مالا متقوما و قد جرى العرف بوقفها في بلد الواقف كان وقفها جائزا على مذهب الامام محمد رحمه الله تعالى كوقف الدراهم والدنانير التي تعورف وقفها و كذا الفاس و القدوم متى تعورف وقفها قصدا على مذهب الامام المشار اليه و قد اختاره اكثر فقهاء الامصار كما في الهداية و هو الصحيح كما في الاسعاف و هو قول اكثر المشايخ كما في الظهيرية كذا في رد المحتار و صرح في شرح الدرر

عليه الفتوى و اما وقف المنقول تبعا للعقار فهو جائز بلا خلاف بين ابي يوسف و محمد رحمهما الله تعالى - وفى رد المحتار ايضا بعد كلام ما نصه و على هذا فالظاهر اعتبار العرف في الموضع او الزمان الذي اشتهر فيه دون غيره فوقف الدراهم متعارف في بلاد الروم دون بلادنا و وقف الفاس و القدوم كان متعارفا في زمن المتقدمين ولم نسمع به في زماننا فالظاهر انه لا يصح الآن ولئن وجدنا نادرا لا يعتبر لما علمت من ان التعامل هو الاكثر استعمالا فتامل انتهى - فالمدار على التعارف و عدمه - و اما السهام المذكورة فوقفها من قبيل وقف المشاع فان كانت سهاما في عقار فوقفها جائز على مذهب ابى يوسف رح و محمد رح ان لم تكن قابلة للقسمة و ان كانت قابلة لها فجواز وقفها على مذهب ابي يوسف رح لا على مذهب محمد رح و صحح كل منها بلفظ الفتوى - و ان كانت سهاما فى منقول فوقفها جائز ان لم تكن قابلة للقسمة و قد جرى التعارف بوقفها ففي حواشى العلامة ابن عابدين على البحر ما نصه . قوله و قال محمد رح يجوز وقف ما فيه تعامل من المنقولات الخ - و اذا عرفت ان وقف المنقول انما هو على مذهب الامام محمد رحمه الله تعالى راعيت الشروط التي اشترطها فى الوقف فيما ايضا ككونه مقسوما غير مشاع فيما يحتمل القسمة متسلما الى متول و ان سقط التاييد انتهى - ثم اعلم ان كلام الفقهاء هنا فيه ميل الى اعتبار العرف الخاص وهي طريقة فى المذهب و هو وجيه فان الفاظ الواقفين تبنى على عرفهم[هذا ما تيسر و ظهرلي في جواب هذا السؤال و الله تعالى اعلم بحقيقة الحال *]

تحريرا فى ٩ محرم سنه ١٣٢٦

نمرة ١٦٧ فتاوى

LXXXI. ما قولكم في رجل هندي حنفي المذهب وقف قراطيس و صكوكا مالية - من التي تعرف عند الافرنج بالرانت - او وقف اسهما في ومبانيات تجارية مما تعورف في زماننا هذا في بعض البلاد فهل وقف هذا صحيح جائز فى البلد اذا جرى به التعامل فى البلاد الرومية مثلا و هل يجوز وقف الفاس و القدوم في زماننا هذا افيدونا و لكم الاجر افندم *

الحمد لله وحده و السلام على من لا نبي بعده و على آله و صحبه

و تابعيه و حزده و بعد فاني قد اطلعت على السؤال المذكور اعلاه و حيث ان كلا من الصكوك المالية و الاسهم التجارية المذكورة و الفاس و القدوم و ما شاكل ذلك جميعه في المنقولات و قد صرحوا بان وقف كل منقول ان كان تبعا للعقار فهو جائز بلا خلاف بين ابي يوسف و محمد وان كان وقفه مستقلا مقصودا غير تابع للعقار فمنعه ابو يوسف رح و قال محمد رح بجواز وقف ما جرى فيه التعامل من المنقولات و اعتبره اكثر فقهاء الامصار كما في الهداية و هو الصحيح كما في الاسعاف و هو قول اكثر المشايخ كما في الظهيرية على انه قد نقل في المجتبى عن السير جواز وقف المنقول مطلقا عند محمد رح و اذا جرى فيه التعامل عند ابي يوسف و على ذلك فمتى كان التعامل قد جرى بوقف تلك القراطيس و الاسهم جاز وقفها خصوصا و انها بمنزلة النقود و الدراهم و الدنانير و قد قال في المنح و لما جرى التعامل في زماننا في البلاد الرومية وغيرها بوقف الدراهم و الدنانير دخلت تحت قول محمد المفتى به في كل منقول فيه تعامل و كذا القدوم و الفاس يجوز وقفهما متى جرى التعامل بذلك و هكذا كل منقول من مكيل و موزون وقيمي و مثلي و قدر و جدارة و ثيابها و مصحف و كتب لان تعامل المسلمين فيما يكون مبناه على العرف من الاحكام حجة يترك بها القياس كالحديث - ما رآه المسلمون حسنا فهو عند الله حسن - كما رواه احمد [في كتاب السنة و هو حديث حسن موقوف لكنه في حكم المرفوع] و لذلك قال في المبسوط ان الثابت بالعرف كالثابت بالنص و الله اعلم *

كتبـــه

محمد بخيت المطيعي الحنفي بالازهر

LXXXII. چه ميفرمايد حضرت حجة الاسلام و ملاذ الانام

مد ظله العالي در اين مسئله شرعيه كه هرگاه اشخاصي جمع گشته و ملكي را بقيمتي معين بشركت مشاعي از روي حصص خريده مثلا كسي دارای ده حصه و كسي بيست حصه و ديگري بمقاوت از روي حصص بخريد كه هر ساله منافع آنرا از روي حصص سرشكن كرده بصاحبان حصص بدهند براي توضيح مسئله صد نفر بازاري را هزار حصه قرار داده قيمت هر حصه را صد روپيه مقرر كرده خريدند - كه منافع آنرا ساليانه ازروي حصص بصاحبانيكه بليت آن شركت دارند برسانند و زيدي مثلا ده بليت كه ده حصه بوده باشد دارد آيا زيد ميتواند كه

این حصه خود را وقف نماید که اصل بحال خود بماند و منافع آن را در جهتی که معین کرده صرف نمایند و این چنین وقف صحیح و نافذ است ازروی قوانین اثنا عشریه با نیست استدعا آنکه حکم مسئله را کاملا آنچه فتوای حضرت عالی است معتضدا بالکتب المعتبرة من علماء السلف قلمی فرموده بخاتم شریف مختم فرمایند [و السلام] *

بسم الله تعالی

وقف مشاع صحیح است باتفاق شیعه و اکثر اهل سنة و جماعة از فقهاء اربعه وغیرهم مگر قول نادری از بعض عامة و اخبار کثیرة صحیحه صریحه بر صحت صدقه مشاع از ائمه علیهم السلام وارد شده که مراد از صدقه یا خصوص وقف است و یا وقف اظهر افراد آن است پس صحت این وقف از جهة مشاع بودن ملک میان چند نفر اشکالی ندارد و چون قبض شرط صحت وقف است باید بقبض موقوف علیه و یا بقبض متولی بدهد همان نحو که اگر حصه خود را میفروخت چگونه بقبض مشتری می آمد و در وقف بقبض متولی بدهد و اگر خود را متولی وقف نموده خودش عمل بوقف نماید و این تصرف خود را تصرف متولی وقف بداند نه تصرف مالک پس اگر وقف نمود ملک مشاع را و بقبض داد صحیح و لازم است و اگر بقبض نداد میتواند رجوع نماید از وقف در حیاة خود و اگر واقف مرد پیش از قبض وقف باطل میشود و الله العالم *

حررة الاحقر عبد الله المازندراني الدجفي

۱۱ شعبان سنه ۱۳۲۵

APPENDIX II.

(سئل) فی رجل وقف حاسوساً فی بلد لم یتعارفوا وقفه ولا تعاملوا به فاذا صدر من واحد او اثنین هل بعد ذلك تعاملا او لا ...

(الجواب ... (۱) و مقتضی قولهم غلب ذلك فی اوقافهم انه لا یکفی صدوره من واحد او اثنین لانه لیس بغالب(۲) قال العلامة ابن الهمام فی التحریر [فی بحث الحقیقة] ان التعامل هو الاکثر استعمالا اه *

فروع - التعامل

مدافع الدقائق شرح مجمع الحقائق صفحة ٢١٩

[اى استعمال الناس فيما بينهم بالاخذ والاعطاء وغيرهما - اعلم ان التعارف والتعامل بمعنى واحد يذكر احدهما في بعض الكتب والاخر في بعضها وقد عطف التعارف على التعامل بطريق التفسير في المحيط حيث ذكر فيه ان ترك القياس جائز بتعامل الناس وتعارفهم انتهى كذا نقل عن الشيخ زاده - في زمن الاجتهاد ان - كان اى التعامل - كليا - قال المصنف في عنوانه لعله العادة الغالبة يلحق اليه اما في الاشباه العادة انما تقبل اذا اطردت او غلبت كتعامل جميع الناس في المزارعة والمشاركة - فاجماع عملي - وسكوتي اذا الادلة الشرعية اربعة والاجماع مختص بالمجتهدين فلابد ان يكون ذلك التعامل في زمنهم راجعا الى اجماعهم كذا بينه احمد الرومي في حاشية المواة وهو حجة فيما لم يخالف الشرع ونص الفقهاء - وان - كان التعامل مختصا - ببلدة خاصة وكذا - اى فاجماع عملي - عند بعض - وفي الحاشية وهو مشايخ - والاصح لا - اى لا يكون اجماعا - بل معتبر - اى ذلك التعامل الخاص - فيما لا نص فيه - اى في حقه للالحاق بالكلي او لرجوعه الى نص - وكذا - الاصح ان التعامل - الكلي في غير زمن الاجتهاد - معتبر فيما لا نص فيه كالتعامل الكلي في زمنه - ولهذا قالوا استعمال الناس حجة - وادرجه بعضهم في قوله عليه السلام ماراٰه المؤمنون حسنا فهو عندالله حسن *

اما العرف الخاص - وهو ما تعارف به قوم معين - فلا يثبت الحكم العام به اى بالعرف الخاص - وقيل يثبت كما نقله المصنف عن البزازية *]

العقد المنظوم في ذكر افاضل الروم الموضوع بهامش الجزء الثاني من تاريخ ابن خلكان - في ترجمة المفتي ابي السعود - صفحة ٤٤٩

ولما وقع الخلاف بينه وبين المولى محمد المشتهر بچوي زاده في جواز وقف النقود الذي شاع في هذه الديار وجرى عليه التعامل في تلك الاقطار كتب رحمه الله رسالة يحقق فيها جوازه واكثر من الدلائل والنقول الدالة مطلقا على جواز وقف المنقول اذا جرى عليه التعامل سيما من المحمول *